83-507

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1983

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Petitioner,

vs.

SHELTER FRAMING CORPORATION and G&R ROOFING COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. Whether the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") imposing "withdrawal liability" on employers who withdrew from multiemployer pension plans prior to the passage of the MPPAA, deprives such employers of their rights to due process and equal protection of the law pursuant to the Fifth Amendment to the U.S. Constitution.

2. Whether the MPPAA's provisions imposing "withdrawal liability" on employers withdrawing from multiemployer pension plans deny such employers their right to due process by altering their financial obligations to such plans.

3. Whether, in actions challenging the constitutionality of the MPPAA, the successful employers are entitled to recover attorneys fees from the assets of a multiemployer plan to which they formerly contributed, under the provisions of 29 U.S.C. Section 1451(e).

TABLE OF CONTENTS

Page

Questions Presented i

I.

Opinions Below 1

II.

Jurisdiction 2

III.

Constitutional and Statutory Provisions Involved 2

IV.

Statement of the Case 2

A. Overview 2

B. Purpose of the MPPAA 4

C. The Cases Below 6

V.

Reasons the Writ Should Be Granted 9

A. The Decision of the Court of Appeals for the Ninth Circuit Is in Conflict With Decisions of the Court of Appeals for the Fourth Circuit and Numerous Lower Courts 9

B. The Lower Courts Are in Conflict With Regard to the Meaning and Application of Prior Decisions of This Court Regarding Retroactive Legislation; Further Guidance From This Court Is Needed 10

C. The Ninth Circuit Erroneously Found That Attorneys Fees Could Be Assessed Against the Carpenters Pension Trust for Carrying Out Its Statutory Obligations Under the MPPAA 19

VI.

Conclusion 23

INDEX TO APPENDICES

Page

Appendix A. Order. Filed: May 20, 1983 .... App. p. 1

Appendix B. Order. Filed: September 13, 1983 28

Appendix C. Opinion of the United States District Court, C.D. California 29

Appendix D. 29 U.S.C. (Supp. V 1981) 71

TABLE OF AUTHORITIES

Cases Page

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978) 16, 17

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 141 21

A-T-O, Inc. v. Pension Benefit Guaranty Corporation, 634 F.2d 1013 (6th Cir. 1980) 17 18

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978) 21, 22

Coronet Dodge, Inc. v. Speckmann, 553 F.Supp. 518 (E.D. Mo. 1982) 12

Energy Reserves Group, Inc. v. Kansas Power & Light Co., ___ U.S. ___, 103 S.Ct. 697 (1983) 15, 18

Grano Steel Corporation v. Shopmen's Ironworkers Pension Plan (C.D. Cal. No. 81-4862) 10

Nachman Corporation v. Pension Benefit Guarantee Corporation, 592 F.2d 947 (1979) aff'd on other grounds, 446 U.S. 359, 100 S.Ct. 1723 (1980) 11, 13, 14, 16

Pacific Iron and Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F.Supp. 523 (W.D. Wash. 1982) 9, 12, 14

Peick v. Pension Benefit Guarantee Corporation, 539 F.Supp. 1025 (N.D.Ill. 1982) 8, 14, 15, 16, 17, 18, 19, 20

Pension Benefit Guaranty Corporation v. Ouimet Corporation, 470 F.Supp. 945 (D. Mass. 1979) aff'd 630 F.2d 4 (1st Cir. 1980), cert. denied, 450 U.S. 914, 101 S.Ct. 1356 17

R.A. Gray and Co. v. Oregon-Washington Carpenters Employers Pension Trust Fund, 549 F.Supp. 531 (D.Or. 1982), rev'd 705 F.2d 1502 (9th Cir. 1983) 9

Page

Railroad Retirement Board v. Alton Railroad, 295, U.S. 330, 55 S.Ct. 758 (1935) 11, 16, 17

Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 693 F.2d 290 (3rd Cir. 1982) 8

Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, ___ F.2d ___ (4th Cir. Sept. 8, 1983) 8, 9, 12, 13, 14, 18, 19

Shelter Framing Corporation, et al. v. Carpenters Pension Trust of Southern California, 543 F.Supp. 1234 (C.D. Cal. 1982) 7, 8

Shelter Framing Corporation, et al. v. Pension Benefit Guarantee Corporation, 705 F.2d 1502 (9th Cir. 1983) 8, 9, 13, 15, 16

Sibley Lindsley and Carr Co. v. Bakery, Confectionary and Tobacco Workers International Union (W.D.N.Y. No. C-82-555 T) 10

S & M Paving v. Construction Laborers Pension Trust, 538 F.Supp. 867 (C.D. Cal. 1982) 17, 18

Textile Workers Pension Fund v. Standard Dye Co., 549 F.Supp. 404 (S.D.N.Y. 1982) 9, 10, 14, 15, 19

United States v. Darusmont, 449 U.S. 292, 101 S.Ct. 549 (1981) 14

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976) 11, 12, 13, 16, 17

Constitution

United States Constitution, Fifth Amendment .... i, 2, 7

United States Constitution, Seventh Amendment 7

Page

Miscellaneous

126 Cong. Rec. H3944 (Daily Ed. May 21, 1980) 4, 5

126 Cong.Rec. S. 10098 (Daily Ed. July 29, 1980) 5

126 Cong.Rec. S. 10156 (Daily Ed. July 29, 1980) 6

126 Cong.Rec. S. 10168 (Daily Ed. July 29, 1980) 5

House Report No. 96-869, Part I, p. 51, U.S. C. Cong. and Adm. News, p. 2919 21

Pension Benefit Guaranty Corporation Multiemployer Study Required by PL 95-214 (July 1, 1978) pp. 40-57 15

Rule

Federal Rules of Civil Procedure, Rules 13(a) 20

Statutes

Employee Retirement Security Act of 1974 (ERISA) 88 Stat. 829 et seq. (29 U.S.C. §1001 et seq. (1976) (Supp. V 1981) 3

Employee Retirement Security Act of 1974 (ERISA) Sec. 4062(b) (29 U.S.C. §1362(b)) 5

Employee Retirement Security Act of 1974 (ERISA) Sec. 4064 (29 U.S.C. §1364) 5

Employee Retirement Security Act of 1974 (ERISA) Sec. 4402(e)(2)(A)) (29 U.S.C. §1461(e)(2)(A)) 6

Multiemployer Pension Plan Amendments Acts of 1980 (MPPAA) 94 Stat. 1208 et seq. 2, 3

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1331 7

Page

United States Code, Title 28, Sec. 1337(a) 7
United States Code, Title 28, Sec. 2101(c) 2
United States Code, Title 29, Sec. 1002(37)(a) 3
United States Code, Title 29, Sec. 1381 .... 3, 4
United States Code, Title 29, Sec. 1381(a) (Supp. V 1981) 2
United States Code, Title 29, Sec. 1382 4
United States Code, Title 29, Sec. 1383(a) 3
United States Code, Title 29, Sec. 1383(b) 3
United States Code, Title 29, Sec. 1383(c) 3
United States Code, Title 29, Sec. 1387 (Supp. V 1981) 2
United States Code, Title 29, Sec. 1389(a) 18
United States Code, Title 29, Sec. 1391 4
United States Code, Title 29, Sec. 1397 (Supp. V 1981) 2
United States Code, Title 29, Sec. 1399 (Supp. V 1981) 2
United States Code, Title 29, Sec. 1399(c)(1) 18
United States Code, Title 29, Sec. 1399(c)(1)(B) 18
United States Code, Title 29, Sec. 1401 (Supp. V 1981) 2, 4
United States Code, Title 29, Sec. 1405 18
United States Code, Title 29, Sec. 1451 (Supp. V 1981) 2, 21
United States Code, Title 29, Sec. 1451(a)(1) 19, 20
United States Code, Title 29, Sec. 1451(e) .... i, 19, 20, 21
United States Code, Title 29, Sec. 1461 (Supp. V 1981) 2
United States Code, Title 29, Sec. 1461(e)(2)(A) 3
United States Code, Title 42, Sec. 2000(e)-5(k) 21

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vs.

SHELTER FRAMING CORPORATION AND G&R ROOFING COMPANY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Carpenters Pension Trust for Southern California respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 20, 1983.

I.
OPINIONS BELOW.

The Opinion of the U.S. Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 705 F.2d 1502. The Order of that Court denying the Petition for Rehearing and Suggestion for Rehearing En Banc, (Appendix B, *infra*) filed September 13, 1983, is not reported. The Opinion of the U.S. District Court (Appendix C, *infra*) is reported at 543 F.Supp. 1234.

II.
JURISDICTION.

The Opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on May 20, 1983. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and was denied on September 13, 1983.

The Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sec. 1254(1).

This Petition is timely filed with this Court under the provisions of 28 U.S.C. Sec. 2101(c).

III.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional and statutory provisions immediately involved in this action are:

a. U.S. Const., Amendment V

b. 29 U.S.C. Section 1381(a) (Supp. V (1981)).

c. 29 U.S.C. Section 1387 (Supp. V (1981));

d. 29 U.S.C. Section 1397 (Supp. V (1981));

e. 29 U.S.C. Section 1399 (Supp. V (1981));

f. 29 U.S.C. Section 1401 (Supp. V (1981));

g. 29 U.S.C. Section 1451 (Supp. V (1981));

h. 29 U.S.C. Section 1461 (Supp. V (1981)).

The statutory provisions are reproduced at Appendix D, *infra*.

IV.
STATEMENT OF THE CASE.

A. Overview.

The present action is one of more than one hundred federal court lawsuits filed since September 28, 1980, challenging the constitutionality of the "withdrawal liability" provisions of the Multiemployer Pension Plan Amendments Act of

1980 ("MPPAA"), 94 Stat. 1208 *et seq.*[1] The MPPAA extensively amends portions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829 *et seq.*, 29 U.S.C. Section 1001 *et seq.* (1976 and Supp. V (1981)).

The MPPAA imposes "withdrawal liability" on employers who "withdraw"[2] from certain "multiemployer pension plans;"[3] 29 U.S.C. Section 1381. The obligation to pay withdrawal liability assessments is imposed on employers who withdrew from such plans on or after April 29, 1980; 29 U.S.C. Section 1461(e)(2)(A). The MPPAA was not enacted until September 26, 1980.

Only those multiemployer plans which have an unfunded vested liability are required to assess withdrawal liability against withdrawing employers. A multiemployer plan's unfunded vested liability is the difference between the actuarial present value of benefit obligations which have vested in beneficiaries of the plan and the value of the plan's assets.

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[1]An extensive list of pending suits challenging the constitutionality of the MPPAA is contained in Appendix E to the Jurisdictional Statement in *Pension Benefit Guaranty Corporation, et al. v. R. A. Gray & Co.* (Docket No. 83-245). The *Gray* appeal is from portions of the same omnibus opinion of the Ninth Circuit as the present petition. However, the facts involved in *Gray* are different from those in the present action. Two of the three issues presented for review in the present Petition are not raised by the appeal in *Gray*.

[2]"Withdrawal" ordinarily occurs when an employer permanently ceases to have an obligation to contribute to the multiemployer plan; 29 U.S.C. Section 1383(a). There are special rules defining withdrawal from plans in the building and construction and entertainment industries; 29 U.S.C. Section 1383(b) and (c). Often, the event triggering withdrawal is the termination of a collective bargaining relationship between the employer and a union.

[3]A multiemployer pension plan is one "to which more than one employer is required to contribute" pursuant to "one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C. Section 1002(37)(a). The Pension Benefit Guaranty Corporation has indicated that there are approximately 2,000 such plans in the United States.

Upon withdrawal, the employer becomes liable to the plan for a proportionate share of the unfunded vested liability. 29 U.S.C. Section 1381.

The obligation to calculate and collect the withdrawal liability assessment falls to the trustees of the multiemployer plan; 29 U.S.C. Section 1382. The calculation of a multiemployer plan's unfunded vested liability and the withdrawal liability of individual employers, is a complex process governed by the intricate provisions of 29 U.S.C. Section 1391. Disputes between a withdrawing employer and the Trustees of the multiemployer plan over withdrawal liability assessments are to be resolved, initially, through arbitration proceedings. 29 U.S.C. Section 1401.

B. Purpose of the MPPAA.

The MPPAA was "designed to remedy certain defects in the pension benefit guaranty program [of ERISA] as it relates to multiemployer pension plans and to protect workers and retirees from the loss of pensions." 126 Cong.Rec. H3944 (Daily Ed. May 21, 1980) (Statement of Rep. Pepper). Provisions of ERISA exacerbated the financial difficulties of multiemployer pension plans in two ways. First, ERISA eliminated the possibility that private pension plans could alleviate their financial difficulties by reducing benefits or narrowing the criteria for receiving pension benefits, except in very limited circumstances. As a result of these strictures, the only steps a pension plan could take to overcome financial problems would be to increase the employers' contribution rate or terminate the pension fund. Second, ERISA contained provisions making employers potentially liable for the unfunded liability of a multiemployer pension plan, but only if such a plan terminated within five years after the employer withdrew from the plan, and only to a maximum of 30 percent of the individual employer's net

worth. *See* Sections 4062(b), 4064 of ERISA, 29 U.S.C. Sections 1362(b), 1364. Senator Williams, co-sponsor of the MPPAA, stated that these provisions of ERISA encouraged plan termination:

> "[E]mployers who remain with plans are forced to pay not only the benefits of their own employees, but also for the retirees who worked for employers who withdrew. *Obviously, the present system encourages employers to abandon a weak plan at the first sign that the industry is in trouble.*"

126 Cong.Rec. S. 10098 (Daily Ed. July 29, 1980) (Emphasis added).

Congress feared that absent any change in ERISA, the termination of multiemployer plans would become an economic reality.

> "The economics of multiemployer pension plans demonstrate why the bill is critical to the more than 8 million workers and retirees covered by these plans. While multiemployer pension benefits are generally modest, for many recipients they mean the difference between poverty and minimum financial security."

126 Cong.Rec. S. 10168 (Daily Ed. July 29, 1980) (Remarks of Sen. Byrd).

One way in which the MPPAA improves the financial condition of multiemployer plans is by imposing financial liability on those employers who withdraw from a multiemployer pension plan which has unfunded vested benefits. "No longer will only those employers who remain with a plan be burdened with the liabilities but the withdrawing employer will be required to pay its fair share of the plan's unfunded liabilities." 126 Cong.Rec. H3944 (Daily Ed. May 21, 1980) (Remarks of Rep. Pepper).

Withdrawal liability provisions of the MPPAA retroactively apply to employers who withdrew from multiem-

ployer pension plans on or after April 29, 1980. Section 4402(e)(2)(A) of ERISA, as amended, 29 U.S.C. Section 1461(e)(2)(A). Congress made the MPPAA retroactive:

> "[To] prevent any employer from withdrawing from a plan under the lenient rules in current law. To permit the withdrawal of these opportunistic employers without imposition of liability, would shift the entire burden to employers remaining as plan participants. The withdrawing employers whose workers had added to the plan's liability, would avoid their responsibility. Their work force had participated in the plan and their work force would benefit from the plan, but these employers would be able to walk away from their responsibility and leave the other employers holding the bag, so to speak."

126 Cong.Rec. S. 10156 (Daily Ed. July 29, 1980) (Remarks of Sen. Matsunaga). Therefore, the retroactive effective date was necessarily used by Congress as "a deterrent for hasty employer withdrawal." *Id.*

C. The Cases Below.

The present action concerns two employers, Shelter Framing Corporation ("Shelter Framing") and G. & R. Roofing Co. ("G & R") which were contributing employers to the Carpenters Pension Trust for Southern California ("CPT") prior to July 1, 1980.

The CPT is a multiemployer plan formed as a result of collective bargaining between union affiliates of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (collectively "the Union"), and several employers associations. Shelter and G & R became obligated to contribute to the CPT when they became bound to collective bargaining agreements with the Union. The agreements specified the amount to be contributed by G & R and Shelter to the CPT for each hour worked by covered carpentry employees.

In July, 1980, the collective bargaining agreements obligating Shelter and G & R to contribute to the CPT terminated. Neither G & R nor Shelter signed a new collective bargaining agreement; both became "non-union" companies. As a result, their obligation to contribute to the CPT terminated and a "withdrawal" within the meaning of the MPPAA occurred. As a result of their withdrawal, each of the employers received a withdrawal liability billing from the CPT.[4]

Each of the employers filed a suit in the U.S. District Court for the Central District of California, seeking to enjoin the collection of the withdrawal liability assessments. Jurisdiction of the U.S. District Court was invoked under 28 U.S.C. Sections 1331 and 1337(a). The employers each claimed that the withdrawal liability provisions of the MPPAA deprived withdrawing employers of the rights to due process and equal protection of the law, in contravention of the Fifth Amendment to the U.S. Constitution.[5]

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[4]The withdrawal liability assessed against Shelter Framing Corporation was $797,648.00. Shelter Framing had the option of paying the assessment in a lump sum within 60 days, or in 40 monthly installments, which, after interest, would total $899,751.88. The withdrawal liability assessed against G & R Roofing Company was $687,387.00. G & R Roofing had the option of paying this assessment in a lump sum, or in 45 monthly payments, totalling $784,824.88.

[5]In addition to these claims, the employers also raised the following constitutional issues: (1) that various provisions of the MPPAA are "void for vagueness;" (2) that the arbitration proceeding prescribed by the MPPAA for resolution of disputes regarding assessment of withdrawal liability deprives employers of their right to a meaningful hearing, and to a jury trial in contravention of the Seventh Amendment of the U.S. Constitution; (3) that the imposition of withdrawal liability constitutes a "taking" of property without just compensation; and (4) that the assessment of withdrawal liability constitutes a "seizure" of assets prior to hearing. The U.S. District Court summarily disposed of all of these constitutional claims, with the exception of the "taking" claim. *Shelter Framing Corporation, et al. v. Carpenters Pension Trust of Southern California*, 543 F.Supp. 1234 (C.D. Cal. 1982). Because of its disposition of the cases on the retroactivity question, the Ninth Circuit did not reach any of these constitutional claims.

The cases were consolidated for hearing before Senior U.S. District Judge Irving Hill.[6] The parties entered into detailed stipulations of fact, and the matters were heard on cross-motions for summary judgment.[7]

On April 13, 1982, Judge Hill entered judgment in favor of the employers, finding that the withdrawal liability provisions of the MPPAA were unconstitutional as applied to Shelter Framing and G & R. *Shelter Framing Co. et al. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234, 1248. The CPT appealed the judgment in each case to the U.S. Court of appeals for the Ninth Circuit. In an opinion combining the CPT's appeals with four other pending appeals, a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed Judge Hill's decision; *Shelter*

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[6]The Pension Benefit Guarantee Corporation ("PBGC") sought leave to intervene in the U.S. District Court proceedings; its motion for leave to intervene was denied as untimely; however, the trial court permitted the PBGC to participate as an *amicus curiae* in the trial court proceedings. The PBGC appealed from the denial of leave to intervene; the District Court's decision was affirmed on appeal. *See Shelter Framing Corporation, et al. v. Pension Benefit Guarantee Corporation*, 705 F.2d 1502, 1507-8 (9th Cir. 1983).

[7]The PBGC argued, in the District Court and before the Ninth Circuit, that Shelter Framing and G & R Roofing Co. were required to arbitrate any disputes they had about the assessment of withdrawal liability before challenging the constitutionality of the MPPAA. These arguments were rejected by the U.S. District Court and the Ninth Circuit. *See Shelter Framing Corporation, et al. v. Carpenters Pension Trust*, 543 F.Supp. 1234-1239 (C.D. Cal. 1982); *Shelter Framing Corporation, et al. v. Pension Benefit Guarantee Corporation, et al.*, 705 F.2d 1502, 1508-9 (9th Cir. 1983). Both Shelter Framing and G & R Roofing admitted, at oral argument before the Ninth Circuit, that arbitration could not possibly eliminate their withdrawal liability assessments, nor reduce their assessments to a *de minimus* level. The lower courts have squarely rejected the argument that arbitration is required before challenging the constitutionality of the statute; *see Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3rd Cir. 1982); *Peick v. Pension Benefit Guarantee Corporation*, 539 F.Supp. 1025, 1038 and note 27 (N.D. Ill. 1982); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, ___ F.2d ___ (4th Cir., Sept. 8, 1983) Slip Opinion at pp. 12-15.

Framing Corp. et al. v. Pension Benefit Guarantee Corp. et al., 705 F.2d 1502 (9th Cir. 1983).

V.
REASONS THE WRIT SHOULD BE GRANTED.

A. The Decision of the Court of Appeals for the Ninth Circuit Is in Conflict With Decisions of the Court of Appeals for the Fourth Circuit and Numerous Lower Courts.

As already noted, the enactment of MPPAA has spawned more than 100 federal court lawsuits attacking the Act on constitutional grounds.

To date, two circuit courts of appeal have passed on the constitutionality of the "retroactivity" aspects of the MPPAA. In *Shelter Framing Corporation, et al. v. Carpenters Pension Trust for Southern California, et al.*, 705 F.2d 1502 (9th Cir. 1982) the Ninth Circuit concluded that the imposition of withdrawal liability on employers who withdrew from multiemployer pension plans between April 29, 1980 and September 26, 1980 is unconstitutional. In *Republic Industries, Inc., et al. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, et al.*, ___ F.2d ___ September 9, 1983) (U.S.C.A. Nos. 83-10454, 83-1109, 83-1119 and 83-1196) the U.S. Court of Appeals for the Fourth Circuit reached the opposite conclusion.

Numerous lower courts have also struggled with the issue. *See, e.g., Peick v. Pension Benefit Guarantee Corporation*, 593 F.Supp. 1025 (N.D. Ill. 1982) [MPPAA constitutional as retroactively applied]; *R. A. Gray and Co. v. Oregon-Washington Carpenters Employers Pension Trust Fund*, 549 F.Supp. 531 (D. Or. 1982), *rev'd* 705 F.2d 1502 (9th Cir. 1983) [same]; *Pacific Iron and Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F.Supp. 523 (W.D. Wash. 1982) [same]; *Textile Worker Pension Fund*

v. Standard Dye Co., 549 F.Supp. 404 (S.D.N.Y. 1982) [same]; *Grano Steel Corporation v. Shopmen's Ironworkers Pension Plan* (C.D. Cal. No. 81-4862) [MPPAA *un*constitutional as retroactively applied]; *Sibley Lindsley and Carr Co. v. Bakery, Confectionary and Tobacco Workers International Union* (W.D.N.Y. No. C-82-555 T) [MPPAA *un*constitutional as retroactively applied]. The conflicting views of trial and appellate courts regarding the constitutionality of the retroactive features of the MPPAA has created great confusion about the legal responsibilities of the trustees of multiemployer trust funds and withdrawn employers. Petitioner is informed that over $800,000,000.00 in withdrawal liability assessments have been made, but remain uncollected, because of the pending constitutional challenges.[8] Until the issue of the constituionality of the retroactive aspects of the MPPAA is definitely resolved by this Court, serious legal and economic uncertainty will continue to exist.

B. The Lower Courts Are in Conflict With Regard to the Meaning and Application of Prior Decisions of This Court Regarding Retroactive Legislation; Further Guidance From This Court Is Needed.

Preliminarily, it should be noted that there are two separate "retroactivity" issues involved in the present case. First, there is the question of whether the MPPAA may be constitutionally applied to employers who withdrew from

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[8]The Pension Benefit Guaranty Corporation has stated that the currently pending federal actions challenging the constitutionality of the MPPAA involve over $64,000,000.00 in withdrawal liability assessments. *See* Jurisdictional Statement in *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.* (Docket No. 83-245), p. 11. Of course, not all withdrawal liability assessments have resulted in legal action. Moreover, many multiemployer plans have refrained from sending out withdrawal liability billings at all, pending the resolution of the constitutional issues raised in this case and similar actions.

multiemployer pension plans during the "corridor" period between the effective date of the Act (April 29, 1980) and the date of the Act's passage (September 26, 1980). Though these provisions apply to a large number of employers who withdrew from multiemployer pension plans during labor negotiations in 1980, the number of such employers is necessarily finite.

The second, and broader, "retroactivity" issue is whether the MPPAA may constitutionally alter, after the fact, written contractual obligations of employers such as Shelter Framing and G & R. The employers claim that trust agreements and other documents establish that their financial obligation is limited to making contributions to the CPT in amounts specified in their collective bargaining agreements. The employers argue that the imposition of withdrawal liability significantly alters these fixed contractual rights after the fact, thereby "rewriting" their contractual obligations to multiemployer pension plans.

Each of these constitutional arguments was raised in the courts below.

In analyzing these "retroactivity" challenges to the MPPAA, the lower courts have relied principally on the decisions of this Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976) and *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330, 55 S.Ct. 758 (1935), and upon the decision of the U.S. Court of Appeals for the Seventh Circuit in *Nachman Corporation v. Pension Benefit Guarantee Corporation*, 592 F.2d 947, 958 (1979) *aff'd on other grounds*, 446 U.S. 359, 100 S.Ct. 1723 (1980).

Though the lower courts have expressed near unanimity in identifying the controlling case precedents, they have displayed wide disagreement about the meaning and appli-

cation of these authorities.

In *Usery v. Turner Elkhorn Mining Co., supra,* this Court found that a federal law, which required coal mine operators to assume a portion of the financial responsibility for providing benefits to coal mine workers who suffer from black lung disease, and who had left the employ of the mine operators prior to passage of the law, was not constitutionally infirm. This Court found the Act to be a rational means of spreading the cost of mine workers' disabilities. The Court noted that the mine operators had received the benefit of the mine workers' labor over a period of many years, and that the factual record established that the mine workers' lung disease was a direct consequence of their exposure to coal dust in the mines.

Several of the lower courts have found the *Usery* decision to be persuasive authority supporting the constitutionality of the withdrawal liability provisions of the MPPAA; *see, e.g., Republic Industries, Inc. v. Teamsters Joint Council No. 83 Virginia Pension Fund,* ___ F.2d ___ (4th Cir. September 9, 1983) Slip Opinion pp. 17-20); *Pacific Iron and Metal Co. v. Western Conference of Teamsters Pension Trust Fund,* 553 F.Supp. 523 (W.D. Wash. 1982); *Coronet Dodge, Inc. v. Speckmann,* 553 F.Supp. 518 (E.D. Mo. 1982).

The Ninth Circuit, in disagreement, found *Usery* not to be controlling, stating that the present case does not involve the "hidden risks" to which the black lung disease legislation was addressed. 705 F.2d at 1514. The Ninth Circuit also held that "Other legislative programs would have served the same purpose of insuring financially healthy multiemployer plans". *Id.* The Ninth Circuit's opinion seems to imply that legislation will not pass the "rationality" test of *Usery* unless it is *the most* rational of the available alternatives. Petitioner believes that this misstates the holding

and intent of *Usery*. Indeed, *Usery* itself holds that "whether [another] cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery, supra,* 428 U.S. at 19. Similarly, the Fourth Circuit concluded that "The congressional response to the problem was a rational one. It is not our function to say that it was the best one." *Republic Industries, supra,* Slip Opinion at 21-22.

In *Nachman Corporation v. Pension Benefit Guarantee Corporation*, 592 F.2d 947 (7th Cir. 1979) aff'd 446 U.S. 359, 100 S.Ct. 1723 (1980), the U.S. Court of Appeals for the Seventh Circuit suggested four factors which should be examined to determine whether legislation with a retrospective impact unconstitutionally abridges the due process rights of those affected. The factors proposed by the *Nachman* opinion are: "(1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens." *Nachman, supra,* 592 F.2d at 960, quoted with approval in *Shelter Framing Corporation, supra,* 705 F.2d at 1511.

Virtually every court which has examined the constitutionality of the retroactivity provisions of the MPPAA has purported to apply these four tests. The lower courts strongly disagree, however, on the result to be reached through application of these tests.

In applying the first of the *Nachman* tests, the Ninth Circuit concluded, in agreement with the District Court, that the reliance interests of the employers outweigh those of the Trust Fund and its beneficiaries. 705 F.2d at 1511-12. Other courts have found that the congressional interest in insuring the solvency of multiemployer pension plans, to-

gether with the interests of pension plan beneficiaries, more than outweighed the employers' reliance interests. *See, e.g., Peick v. Pension Benefit Guarantee Corporation, supra,* 539 F.Supp. at 1041-46; *Republic Industries, Inc. v. Teamsters Joint Council No. 38 of Virginia Pension Fund, supra,* Slip Opinion at 18; *Pacific Iron and Metal Co. v. Western Conference of Teamsters Pension Trust Fund, supra,* 553 F.Supp. 523, 526; (W.D. Wash. 1982); *Textile Workers Pension Fund v. Standard Dye Co.,* 549 F.Supp. 404, 406-408 (S.D. N.Y. 1982).[9]

Each of the courts which has considered the second *Nachman* factor, "prior regulation" has found that there was significant prior federal regulation of multiemployer pension plans. *See, e.g., Peick, supra,* 539 F.Supp. at 1044-1045. Though acknowledging that this factor weighs in favor of retroactive application, the Ninth Circuit held that this con-

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[9]The District Court dismissed the decisions of this Court upholding the retroactive imposition of tax liabilities as "*sui generis* because of the taxable year concept." 543 F.Supp. at 252. The trial court's reference is to decisions of this Court such as *United States v. Darusmont,* 449 U.S. 292, 299, 101 S.Ct. 549, 553 (1981). With all respect to the District Court, there is nothing in the decisions of this Court that indicates that public interest legislation other than tax legislation is subject to differing constitutional standards. If the justification for permitting some retroactivity in the taxation area is the strong public interest in preserving the federal fisc, the same justification can be applied to the MPPAA. When the MPPAA was enacted, Congress was acting on the advice of the Pension Benefit Guaranty Corporation that failure to impose withdrawal liability on employers contributing to multiemployer pension plans would eventually lead to the failure of many such plans, and a possible obligation on the part of the Pension Benefit Guaranty Corporation, a federal agency, to insure benefits to the beneficiaries of such failing plans. Certainly, this was a public concern equal in dignity to that involved in the collection of federal taxes.

To the extent that the cases upholding retroactive taxation do so because such laws apply only to earlier portions of a "taxable year," the same defense may be made of the MPPAA. The retroactive application of the MPPAA was for a period of only five months, a period long enough to insure that employers who were monitoring congressional legislation would not bolt from a plan just before final passage of the MPPAA by Congress.

sideration "does not sway us from our conclusion that such application of the Act impaired the employers' reliance interests to an unduly harsh degree". 705 F.2d at 1512. The Ninth Circuit emphasized that the MPPAA made changes in the prior federal regulatory scheme which were far more than minor. *Id.* Petitioner does not dispute this point, but notes that ERISA, as originally enacted, contemplated further regulation of the area. The PBGC's proposals including the possible imposition of withdrawal liability, were presented in 1978. *See Peick, supra*, 539 F.2d at 1031-32. *See also Pension Benefit Guaranty Corporation Multiemployer Study Required By PL 95-214* (July 1, 1978) pp. 40-57. Thus, the significant changes in federal pension laws wrought by the MPPAA can scarcely be termed a "surprise" to employers. They had been in the works for several years prior to their actual enactment.[10] *Cf., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, ___ U.S. ___, 103 S.Ct. 697 (1983).

The Ninth Circuit also makes much of the fact that "it would have been impossible for anyone to predict with accuracy the final outcome of the legislative process" leading to the enactment of the MPPAA. 705 F.2d at 1511. With all due respect, this comment misses the point. The issue is not whether employers knew *exactly* what type of requirements the MPPAA would impose; it is enough that employers knew or should have known the new legislation *might* impose withdrawal liability and might contain a retroactivity clause to avoid a last minute "stampede" of

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[10]The record below shows that there were numerous articles, in contractors' publications and labor law periodicals, informing contractors and their labor advisors about the progress of the MPPAA legislation during its gestation Congress. *See also* the discussion in *Textile Workers Pension Fund v. Standard Dye Co.*, 549 F.Supp. 404, 408 (S.D.N.Y. 1982).

withdrawing employers. A retroactivity clause had been a consistent feature of the withdrawal liability proposals throughout the congressional consideration of the Act. *See Peick, supra*, 539 F.Supp. at 1053.

In applying the third *Nachman* factor, the "equities," the Ninth Circuit concluded that the "withdrawal liability imposed on the employers for their pre-Amendments Act termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of insuring financially healthy multiemployer plans."[11] 705 F.2d at 1514. We have already noted that this conclusion is inconsistent with the holding of this Court in *Usery v. Turner Elkhorn Mining Co., supra*, that the *relative* wisdom of a congressional enactment, when measured against other possible legislative solutions, "is not a question of constitutional dimension". 428 U.S. at 19.

The Ninth Circuit's evaluation of the equities relies strongly on this Court's decision in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330, 55 S.Ct. 758 (1935) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1978). We believe reliance on these authorities is misplaced.

Numerous courts have questioned whether *Alton Railroad*, a 48 year old decision of this Court, accurately states

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[11]Both the trial court and the Ninth Circuit seemed impressed with the fact that G & R and Shelter Framing claimed that the withdrawal liability assessments would absorb a substantial portion of their net worth. CPT did not accede to the accuracy of these claims by the employers. Moreover, both Shelter Framing and G & R are closely held corporations, whose sole owners are individuals of significant substantial worth. Finally, even if the assertions of Shelter Framing and G & R Roofing regarding the impact of withdrawal liability assessments on their net worth were taken at face value, the constitutionality of the MPPAA can hardly depend upon the liability figures which arise in a test-case context.

the current constitutional standards for evaluating retroactive legislation: "*Assuming that the portion of Alton invalidating this provision retains vitality*, we find it distinguishable from this case." *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 19 [Emphasis supplied]; *see also A-T-O, Inc. v. Pension Benefit Guaranty Corporation*, 634 F.2d 1013 (6th Cir. 1980); *Pension Benefit Guaranty Corporation v. Ouimet Corporation*, 470 F.Supp. 945 (D.Mass. 1979) *aff'd* 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914, 101 S.Ct. 1356; *S & M Paving v. Construction Laborers Pension Trust*, 538 F.Supp. 867, 874-875 (C.D. Cal 1982).

The *Spannaus* decision is totally inapposite. *Spannaus* was a challenge to the validity of *state* legislation, in an area in which the State of Minnesota had concededly never legislated before (interstate pension plans). The legislation was scheduled to expire upon the effective date of ERISA. The State of Minnesota sought to apply the challenged law to *interstate* businesses, which had minimum numbers of employees in Minnesota, despite the fact that these businesses might maintain the bulk of their operations elsewhere and might get caught in a "squeeze" between Minnesota regulation and that of other states. Moreover, as this Court noted, the Minnesota legislature had made "no showing . . . that this severe disruption of contractual expectations was necessary to meet an important general social problem." 438 U.S. at 247, 98 S.Ct. at 27-24. In the present case, by contrast, there is extensive legislative history showing the need for employer withdrawal liability assessments, to prevent employers from dropping out of collectively bargained pension plans without taking responsibility for their employees' share of the unfunded vested liability of such plans. *See Peick v. Pension Benefit Guaranty Corporation, supra*, 539 F.Supp. 1052, 1027-1030 (N.D. Ill. 1982).

Significantly, no appellate court has found the *Spannaus* holding to be controlling in any case challenging the retroactive application of *any* of the provisions of ERISA, including the pre-MPPAA provisions. *See, e.g., A-T-O, Inc. v. Pension Benefit Guaranty Corporation*, 634 F.2d 1013 (6th Cir. 1980). *See also S & M Paving v. Construction Laborers Pension Trust*, 539 F.Supp. 867, 870 (C.D. Cal. 1982). *Cf., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, ___ U.S. ___, 103 S.Ct. 697 (1983).

Finally, the Ninth Circuit found that the fourth *Nachman* test, the existence *vel non* of "moderating provisions" in the MPPAA, weighed against its constitutionality as retroactively applied. Other courts have reached an opposite conclusion; *see, e.g., Peick v. Pension Benefit Guaranty Corporation, supra*, 539 F.Supp. at 1050-1051; *Republic Industries, Inc., et al. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, ___ F.2d ___ (4th Cir., September 9, 1983), Slip Opinion, pp. 24-25.

The Ninth Circuit identified four ameliorating factors which temper the severity of the withdrawal liability provisions. These are: (1) the existence of a "de minimus" exemption; 29 U.S.C. Section 1389(a); (2) the availability of time payments; 29 U.S.C. Sec. 1399(c)(1); (3) the limitation of liability to the first 20 annual payments if more than 20 years are needed to amortize an employer's withdrawal liability; 29 U.S.C. Sec. 1399(c)(1)(B); and (4) reduction in liability if the employer withdraws because it has liquidated or dissolved its business; 29 U.S.C. Sec. 1405.

The Fourth Circuit, in the *Republic Industries, supra*, identified the following additional ameliorative factors which were not considered by the Ninth Circuit:

> "In addition, as moderating factors, the 1980 Act insures that an employer's liability will be proportionate to its past annual contributions. §1399(c)(1)(C). It

provides that withdrawal does not generally occur when an employer ceases covered operations or ceases to contribute as a result of a bonafide sale of assets to an unrelated party which assumes the obligation to continue contributions. §1384. Nor does an employer's change in corporate structure or change to an incorporated form of business enterprise constitute a withdrawal if the successor continues to contribute to the plan. §1398(1). A withdrawal does not occur solely because an employer suspends contributions during a labor dispute involving its employees. §1398(2). Finally, with respect to certain industries, an employer is excused from withdrawal liability if the plan's contribution base will not be harmed by the withdrawal. §1383." *Republic Industries, supra*, Slip Opinion at 24-25.

Other courts have disagreed with the Ninth Circuit's holding that the MPPAA's mitigating factors are insubstantial. *See Peick, supra*, 539 F.Supp. at 1050-1051; *Textile Workers Pension Fund, supra*, 549 F.Supp. at 408-9.

C. The Ninth Circuit Erroneously Found That Attorneys Fees Could Be Assessed Against the Carpenters Pension Trust for Carrying Out Its Statutory Obligations Under the MPPAA.

Relying on the provisions of 29 U.S.C. §§1451(a)(1) and 1451(e), the District Court and the Ninth Circuit of Appeals held that respondents were entitled to recover their attorneys fees in their suits challenging the constitutionality of the MPPAA. The source from which such fees must be paid is, of course, the assets of the CPT.

Attorney's fees were awarded despite the following admitted facts: (1) The CPT was under a statutory obligation to assess withdrawal liability against all employers that "withdrew" from the CPT after April 29, 1980; (2) "Trust-

ees that fail to collect these [withdrawal liability] payments are subject to suit for breach of fiduciary duty. 29 U.S.C. §1105 (1976)." *Peick v. Pension Guaranty Benefit Corporation, supra*, 539 F.Supp. at 1034; (3) The present actions were not initiated by the CPT, but by the employers. CPT's participation in the actions consisted of defending the statutory scheme pursuant to which it was required to assess withdrawal liability, and filing a counter-claim, seeking to collect the withdrawal liability assessment. Such a counter-claim is mandatory, under the provisions of FRCP 13(a).; (4) The CPT attempted to secure the intervention of the Pension Benefit Guaranty Corporation in this action, to permit the PBGC to defend the constitutionality of the MPPAA. However, the PBGC did not seek leave to intervene in these actions until after the proceedings in the U.S. District Court had progressed past the preliminary injunction phase.

29 U.S.C. §1451(e) authorizes the District Court to award attorney's fees in any action brought under 29 U.S.C.'s §1451(a)(1) by a party "who is adversely affected by the act or omission of any party under this sub-title with respect to a multiemployer plan."

In the present case, the employer's complaint does not allege any improper or erroneous action on the part of the CPT. The whole thrust of the employer's Complaint is an attack on the *constitutionality* of the MPPAA itself. Thus, no "act or omission" of the CPT gives rise to plaintiff's claim. The claim originates from the MPPAA's command to the CPT to assess withdrawal liability against employers withdrew from the CPT.

It seems clear that the statute was designed to provide for an award of attorney's fees in cases where there is a *dispute* as to whether a party has acted properly. No such issues are raised in the instant case.

This interpretation of the statute is consistent with the legislative history of the MPPAA, which repeatedly cites concern with the "financial conditions of multiemployer plans" as a primary motive for the passage of the Act. *See, e.g.*, House Report No. 96-869, Part I, p. 51, U.S.C. Cong. and Adm. News, pg. 2919. Nothing in the legislative history of the MPPAA suggests that the framers of the MPPAA ever intended that the attorney's fee provision of section 1451 would be used as a basis for granting attorneys fees in a case challenging the *constitutionality of the Act itself.*

It has long been recognized that "it is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415, 98 S.Ct. 694, 697 (1978). Thus, if 29 U.S.C. §1451 does not furnish a basis for the award of attorneys fees, in the absence of some other statute supporting such an award, it is improper to grant attorneys fees to the employers.

Even if one were to assume that §1451 *does* provide a basis for the award of attorney's fees, in a case challenging the constitutionality of the MPPAA, it is clear that the criteria for such an award have not been met in these cases. The award of attorney's fees in *any* case under §1451(e) is discretionary, rather than mandatory. The statute is thus similar to the provisions of Title VII of the Civil Rights Act of 1964, which also permits a federal court, in its discretion, to award attorney's fees to the "prevailing party." See 42 U.S.C. §2000(e)-5(k).

In *Christiansburg*, this Court held that the legislative history underlying the enactment of Title VII of the Civil Rights Act of 1964 must be examined in order to determine the proper criteria for awarding attorneys fees to a "pre-

vailing party'' in a suit under that statute. In *Christiansburg*, the Court held that a prevailing employer could obtain attorneys fees against the plaintiff only when the plaintiff's action was shown to have been ''frivolous, unreasonable, or without foundation.'' 434 U.S. at 421, 98 S.Ct. at 700.

Given the strong congressional purpose to preserve the assets of multiemployer trust funds evidenced in the legislative history of the MPPAA, the same type of critical examination should be employed by district courts in ruling on applications for attorneys fees against trust funds which assess withdrawal liability against employees. The passage of the MPPAA was designed to *encourage* (and, indeed, *require*) multiemployer trust funds to aggressively pursue withdrawing employers, to insure that they pay their fair share of the unfunded vested liability of such trust funds. It would be antithetical to this purpose to expose a trust fund to an award of attorneys fees in every case in which it is unsuccessful even though its claim has arguable merit. The *Christiansburg* standard, therefore, appears to be the appropriate one.

The award of attorneys fees in these cases will deplete the assets set aside for the provision of pension benefits. Because the CPT is simply a fund of money derived from employer contributions and investment of contributed monies, which exist to provide pension benefits to retirees, any attorneys fee award which the CPT is required to pay will necessarily diminish the amount available for pensions. The very reason for the enactment of the MPPAA is because of Congress' perception that multiemployer pension plans like the CPT are, in the long term, in serious financial trouble. The award of attorneys fees would thus frustrate Congress' principal objective in enacting the MPPAA.

VI.
CONCLUSION.

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A.

Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5271

D.C. No. CV 81-4457-IH

Filed: May 20, 1983

SHELTER FRAMING CORPORATION,

Plaintiff/Appellee,

and

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellee,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Applicant for Intervention/Appellant.

No. 82-5272

D.C. No. CV 81-5551-IH

G & R ROOFING COMPANY, a California Corporation,
Plaintiff/Appellee,

and

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellee,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Applicant for Intervention/Appellant.

No. 82-5460

D.C. No. CV 81-4457-IH

SHELTER FRAMING CORPORATION,

Plaintiff/Appellee,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellant.

No. 82-5461

D.C. No. CV 81-5551-IH

G & R ROOFING COMPANY,
Plaintiff/Appellee,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellant.

No. 82-5462

D.C. No. CV 81-5551-IH

G & R ROOFING COMPANY,
Plaintiff/Appellant,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellee.

No. 82-3506

D.C. No. CV 81-912-JAR

R.A. GRAY AND CO.,
Plaintiff/Appellant,

v.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND AND PENSION BENEFIT GUARANTY CORPORATION,
Defendants/Appellees.

Argued and Submitted December 7, 1982
Decided May 20, 1983.

Appeals from: The United States District Court
for the Central District of California
Hon. Irving Hill, Presiding;
and

The United States District Court
for the District of Oregon
Hon. James A. Redden, Presiding.

Before: WRIGHT, KENNEDY, and BOOCHEVER, Circuit Judges.

BOOCHEVER, Circuit Judge:

This opinion addresses the constitutionality of the retroactive application of the Multiemployer Pension Plan Amendments Act (the "Amendments Act"),[1] the subject of extensive nationwide litigation.[2] We hold that retroactive application of the withdrawal liability provision of the

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[1]Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified at 29 U.S.C. §§ 1001a *et seq.* (Supp. V 1981).

[2]The following is a partial list of related cases: *Sibley, Lindsay & Curr, Co. v. Bakery, Confectionery & Tobacco Workers Int'l Union*, ___, F.Supp. ___, No. Civ. 82-555T (W.D.N.Y. Mar. 16, 1983); *Washington Star Co. v. Int'l Typographical Union Nego. Pension Plan*, Civ. No. 82-1568 (D.D.C Feb. 9, 1983) (mem.); *Bakersfield Concrete Constr. Inc. v. Construction Laborers Pension Trust*, No. 82-0044-WPG (C.D. Cal. Jan. 10, 1983); *Republic Indus. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, Civ. No. 82-0919-A (E.D. Va. Dec. 29, 1982) (mem.); *Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982); *Grano Steel Corp. v. Shopmen's Ironworkers Pension Plan*, No. CV 81-5862 LEW (C.D. Cal. Nov. 9, 1982); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 3 Empl. Ben Cas. 2129 (S.D.N.Y. 1982); *Pacific Iron & Metal Co. v. Western Conf. of Teamsters Pension Trust Fund*, No. C 82-653C (W.D. Wash. Oct. 15, 1982); *Coronet Doge v. Speckmann*, No. 81-724 C(3) (E.D. Mo. Sept. 30, 1982) (mem.); *Fur Mfg. Indus. Retirement Fund v. Lazar-Wisotzky, Inc.*, 550 F. Supp. 35 (S.D.N.Y. 1982); *Victor Constr. Co. v. Construction Laborers Pension Trust*, No. 81-5144-CHH (C.D. Cal. June 25, 1982); *Terson Co. v. Pension Benefit Guar. Corp.*, 3 Empl. Ben. Cas. 2372 (N.D.Ill. 1982), (dismissed as moot, unpublished order); *Peick v. Pension Benefit Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982); *S & M Paving, Inc. v. Construction Laborers Pension Trust*, 539 F. Supp. 867 (C.D. Cal. 1982).

Amendments Act violates the due process rights of employers who withdrew from multiemployer pension plans before the Act became law.[3]

I. BACKGROUND

On September 26, 1980, the President signed into law the Amendments Act, amending certain provisions of the Employee Retirement Income Security Act ("ERISA")[4] Under ERISA, the Pension Benefit Guaranty Corporation (the "Guaranty Corporation"), a government corporation, administers a system of termination insurance designed to protect employees whose pension plans fail or terminate with insufficient funds. The Guaranty Corporation receives no direct federal appropriations, but relies primarily on premium payments to meet its obligations to employees whose guaranteed benefits exceed the value of their plans' assets when the plans terminate. 29 U.S.C. § 1307 (Supp. V 1981).

When the Guaranty Corporation expended its own funds, it was formerly authorized by Title IV of ERISA to impose

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[3]Several appeals are consolidated for disposition by this opinion. In nos. 82-5271 and 82-5272, the Pension Benefit Guaranty Corp. appeals the district court's denial of its motion to intervene in the suit brought by Shelter Framing Corp. and G & R Roofing Co. against Carpenters Pension Trust.

Nos. 82-5460 and 82-5461 are the appeals brought by Carpenters Pension Trust from the district court's grant of summary judgment in favor of plaintiffs Shelter Framing and G & R Roofing.

No. 82-5462 is the cross-appeal brought by G & R Roofing Co. challenging, *inter alia*, the district court's refusal to declare the Multiemployer Pension Plan Amendments Act unconstitutional as a taking of property without just compensation.

All of the above appeals are from the judgments of Hon. Irving Hill, C.D. California.

In No. 82-3506, R.A. Gray & Co. appeals from the grant of summary judgment by Hon. James A. Redden, D. Oregon, in favor of defendants Oregon-Washington Carpenters-Employers Pension Trust Fund and the Pension Benefit Guaranty Corp.

[4]Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1381 (1976)).

secondary liability on employers. Employers who withdrew from multiemployer plans incurred a contingent liability. If a plan terminated, all employers who contributed to that plan during the five years immediately preceding its termination were collectively liable to the Guaranty Corporation for the amount of Guaranty Corporation expended. If termination liability arose, however, no single employer's liability could exceed thirty percent of that employer's net worth. *Id.* at §§ 1362(b)(2), 1364 (1976).

The Guaranty Corporation advised Congress that the contingent liability provisions of ERISA gave employers an incentive to withdraw from multiemployer plans, particularly when their plans were in poor financial health. Congress responded by enacting the Amendments Act, which replaced contingent liability with absolute liability upon withdrawal. Under the Amendments Act, an employer who withdraws must immediately begin to pay a fixed and certain debt owed to the pension plan. The withdrawal liability is the employer's proportionate share of the plan's unfunded vested liability, the difference between the present value of vested benefits and the value of the plan's assets. The withdrawal liability provision was assigned a retroactive effective date of April 29, 1980. *Id.* at § 1461(e)(2)(A) (Supp. V 1981).

II. FACTS

There are no disputed issues of material fact. A 1959 trust agreement between the United Brotherhood of Carpenters and Joiners of America ("the Union") and several multiemployer associations formed the Carpenters Pension Trust for Southern California, a multiemployer pension plan which primarily covers employees in the building and construction industry. The Trust assets are managed by a board of trustees. Half of the trustees are appointed by the Union;

the other half are appointed by the multiemployer associations.

Shelter Framing Corporation is a licensed construction contractor in Southern California. Prior to July 1, 1980, Shelter Framing was bound by a collective bargaining agreement with the Union. The agreement obligated Shelter Framing to contribute to the trust fund for each hour worked by covered carpentry employees.

That agreement terminated on July 1, 1980. Shelter Framing and the Union attempted to reach a new agreement but failed. When their negotiations reached an impasse, Shelter Framing was no longer required to make any contributions to the trust fund on behalf of its employees. It ceased making payments on August 12, 1980.

On April 24, 1981, the trustees notified Shelter Framing that it had withdrawn from the trust within the meaning of the Amendments Act, and Shelter Framing thus owed to the trust fund withdrawal liability of $797,648.00. Shelter Framing had the option of paying the liability claim in a lump sum within 60 days, or in 40 monthly installments which, after interest, totalled $899,751.88. Shelter Framing admitted it withdrew from the trust, but refused to make any payments on the liability claim. The joint statement of stipulated facts indicates that for the period ending March 31, 1981, the withdrawal liability equals about 180 percent of the total stockholder equity in the corporation.[5]

G & R Roofing Company is a construction contractor, obligated under a collective bargaining agreement to make contributions to the Carpenters Pension Trust for each hour

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[5]In its brief on appeal, Shelter Framing states that the withdrawal liability now exceeds twice the net worth of the corporation and that immediate payment of the total claim is financially impossible, as it would require the complete termination of operations and sale of the corporate assets.

of covered work performed by carpentry employees. The agreement expired July 1, 1980, and the parties failed to reach a new agreement. The last pension contribution G & R made to the trust fund was for work performed through August 12, 1980. On September 2, 1981, the trustees assessed withdrawal liability against G & R for $687,387.00. G R & could pay a lump sum of that amount, or pay a total of $784,824.88 in 45 monthly payments. The stipulated facts indicate that for the fiscal year ending September 30, 1981, the withdrawal liability equals about forty percent of the total stockholder equity in the company.[6]

On August 28, 1981, Shelter Framing filed suit against the trust, seeking to enjoin the collection of withdrawal liability on constitutional grounds. G & R filed a similar complaint against the trust on October 27, 1981. The trustees answered and counterclaimed for collection of the assessed withdrawal liability in both cases, which were consolidated before Senior District Judge Irving Hill.

On October 2, 1981, the trust's co-counsel informed the appellant Guaranty Corporation of the pending suit. The Guaranty Corporation is authorized to intervene in civil actions brought under the withdrawal liability provisions of ERISA. 29 U.S.C. § 1451(g) (Supp. V 1981). The Guaranty Corporation declined the trustees' invitation to intervene, though it said it would monitor the case. G & R sent a Notice of Service of Complaint in its action to the Guaranty Corporation on October 30, 1981.

In November, G & R and Shelter Framing filed motions for preliminary injunctions against attempts by the trustees

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[6]In its brief on appeal, G & R reiterates that if paid in a lump sum, the withdrawal liability totals forty percent of the company's net worth. If paid on a monthly basis, the annual liability would represent ninety-four percent of G & R's net income for its fiscal year 1981.

to collect the withdrawal liability. The Guaranty Corporation learned from a G & R attorney in early November that the motions would be heard on December 7, 1981. The motion hearing was continued until January 11, 1982.

Judge Hill granted the plaintiffs' motions to enjoin further efforts by the trustees to collect withdrawal liability. On January 14, 1982, at a hearing held to set the terms of the preliminary injunctions, Judge Hill said he would enjoin the parties from arbitrating the disputed amount of withdrawal liability. The order was entered on January 20, 1982. The parties then filed cross-motions for summary judgment, accompanied by a joint statement of stipulated facts.

The Guaranty Corporation moved to intervene in the case on February 22, 1982. It sought to dissolve the injunction against arbitration between the employers and the trustees. The district court held that the Guaranty Corporation could not move for partial dissolution of the preliminary injunctions unless and until it was a party to each action, but agreed to hear the question of exhaustion of arbitration on March 22, 1982, before the hearing on the motions for summary judgment. The court denied the Guaranty Corporation's motion to intervene as untimely, and stated the parties would be prejudiced if the Guaranty Corporation were given leave to intervene. It did allow the Guaranty Corporation to participate as *amicus curiae*.

After hearing arguments, Judge Hill held that exhaustion of the administrative remedy of arbitration was not required before proceeding to the merits of the constitutional challenges, because the arbitrators could not adjudicate or develop a better record for adjudication of the constitutional claims. On cross-motions for summary judgment, the court held that the Amendments Act was unconstitutional as applied to Shelter Framing and G & R. Judgments were entered in favor of plaintiffs on April 13, 1982. The court also

awarded attorney's fees to plaintiffs.[7]

After entry of judgment, the parties entered into a stipulation to allow the Guaranty Corporation to intervene for purposes of appeal. The Guaranty Corporation chose not to intervene, and the court denied the intervention on the ground that it lacked jurisdiction to reverse by stipulation its prior order denying intervention. The Guaranty Corporation appeals the district court's prior denial of the motion to intervene at trial and also seeks to appeal the court's failure to require arbitration before ruling on the constitutional claims.

R.A. Gray & Co. is an employer who was obligated under a collective bargaining agreement with the Oregon State Council of Carpenters to contribute to the Oregon-Washington Carpenters-Employers Pension Trust Fund. The parties did not renew the agreement when it expired on May 31, 1980. On July 24, 1981, the trustees notified R.A. Gray that it had withdrawn from the multiemployer plan as of June 1, 1980 and assessed withdrawal liability in the amount of $201,359.00.

R.A. Gray sued for declaratory and injunctive relief in September 1981, challenging the constitutionality of the Amendments Act on grounds similar to those considered in Judge Hill's court. Judge Redden denied R.A. Gray's request for a preliminary injunction, and granted summary judgment for the trust.

III. THRESHOLD ISSUES

Before we reach the issue of the constitutionality of the retroactive application of the Amendments Act, we must consider two threshold issues raised by the Guaranty Cor-

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[7]Judge Hill's opinion is reported at 543 F. Supp. 1234 (C.D. Cal. 1982).

poration in appeal numbers 82-5271 and 82-5272. The first is whether the district court abused its discretion in denying the Guaranty Corporation's motion to intervene. The second is whether parties challenging the constitutionality of the Amendments Act must exhaust the administrative remedy of arbitration before adjudication of the constitutional claims.

A. INTERVENTION

Federal Rule of Civil Procedure 24(a) allows intervention as of right upon timely application when a federal statute confers an unconditional right to intervene, or when the applicant claims an interest relating to the subject of the action and disposition may impair or impede its ability to protect that interest. A district court's ruling that an intervention motion is untimely will not be overturned unless the court abused its discretion. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1009 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

The district court did not abuse its discretion in denying the Guaranty Corporation's motion. The court stated that the motion was untimely and that the Guaranty Corporation had forfeited its right of intervention by permitting the matter to progress as far as it had without attempting to intervene.

We weigh three factors to determine timeliness: the stage of the proceedings at which an applicant seeks to intervene, the reason for and length of the delay, and whether the parties would suffer prejudice. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978). Our focus is on the date the Guaranty Corporation should have been aware its interest would not be protected adequately by the parties, not the date it learned of the litigation. *See id.*; *Legal Aid Society of Alameda Co. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980) (per curiam).

The Guaranty Corporation argues that it does not have the staff to intervene in all actions challenging the constitutionality of the Amendments Act (now over 100 nationwide) and must monitor cases until it decides intervention is required to protect its interests. In the cases here on appeal, it claims that it was not aware until mid- to late January that the Carpenters Pension Trust would not take the position favored by the Guaranty Corporation, requiring arbitration as an administrative remedy before adjudication of the constitutional claims. It "suspected" that its interests might not adequately be represented on January 15, 1982, when it learned that the trust's counsel did not oppose an injunction against arbitration. The suspicion "turned to alarm" when the Guaranty Corporation received a copy of the court's injunction on January 25, 1982.

We are not convinced by the Guaranty Corporation's claim that it did not suspect that the trust would not protect the Guaranty Corporation's interests until late January. The Guaranty Corporation knew in early November that preliminary injunction motions had been filed. It never inquired what position the trust or other parties would take on the arbitration issue. The trust never indicated to the Guaranty Corporation it would ask for arbitration; in fact, the trust's counsel stated "no one could have had a reasonable basis for assuming" that the trust would seek arbitration.

In *Alaniz*, appellants sought intervention seventeen days after a consent decree became effective. They argued that they did not know the settlement decree would be to their detriment. The court affirmed denial of their motion, stating "surely they knew the risks. To protect their interests, appellants should have joined the negotiations before the suit was settled." 572 F.2d at 659. The Guaranty Corporation even more clearly knew the risks in these cases. Had it monitored the cases, as it told the trust it would, it could

not reasonably have assumed that the trust would demand arbitration.

Even if the Guaranty Corporation is not held to have known the risks, and did not learn its interests were jeopardized until January 15, it still fails the timeliness test. It did not move to intervene until February 22, more than one month after its original "suspicion" arose. *See NAACP v. New York*, 413 U.S. 345, 367 (1973) (delay of two and one-half weeks was untimely where motion papers indicated a strong likelihood that the parties would enter into a consent decree). Since prompt adjudication of the employers' claims was in the litigants' interest, they would be prejudiced by permitting this inexcusably late intervention motion.

Finally, the district court allowed the Guaranty Corporation to argue as *amicus curiae* on the issue of arbitration, thus the Guaranty Corporation had fair opportunity to present its views to the court. In view of that opportunity, and the Guaranty Corporation's untimely action, we hold that the district court did not abuse its discretion.

B. ARBITRATION

The Guaranty Corporation argues that the district court lacked jurisdiction and, in any event, should not have addressed the constitutional issues before requiring arbitration because arbitration of withdrawal liability is statutorily mandated and, if not mandatory, should be required as a matter of policy. In view of our decision that the district court did not err in denying the Guaranty Corporation's motion to intervene, the Corporation has no standing to raise the arbitration issue. Nevertheless, we must reach that issue at least to determine whether arbitration of withdrawal liability was mandated, before the district court could address the constitutionality of the withdrawal provisions.

Section 4221(a)(1) of ERISA does provide for resolution of disputes through arbitration proceedings. 29 U.S.C. § 1401(a)(1) (Supp. V 1981). The statute is limited, however, to those disputes involving a determination made under section 4201 through 4219 of ERISA. Those sections refer to the establishment, computation and collection of withdrawal liability. 29 U.S.C. at §§ 1381-1399 (Supp. V 1981). Thus the arbitration requirement does not apply where the constitutionality of the statute, not the establishment or amount of withdrawal liability, is at issue. The district court correctly found no mandatory arbitration requirement for determination of constitutional issues.

Where there is no statutory requirement of exhaustion, the court should balance the agency's interests in applying its expertise, making a proper record, and maintaining an efficient, independent administrative system with the interests of private parties in finding adequate redress. *Montgomery v. Rumsfield*, 572 F.2d 250, 253 (9th Cir. 1978). We recognize the importance of the exhaustion doctrine and its underlying policy of judicial efficiency. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Upon weighing the relevant factors, however, we conclude that arbitration in this case would be of no value to the parties or the court. The Guaranty Corporation's expertise relates only to how the Amendments Act is to be applied and administered; it cannot aid the court in addressing the naked constitutional law issue raised by the employers in their direct attack upon the entire statutory scheme. Arbitration would not eliminate the assessed withdrawal liability. There is only a remote possibility that liability would be reduced materially. Arbitration would neither develop a better record for adjudication of the constitutional issues nor eliminate the need to consider the constitutional challenge.

Our conclusion is consistent with the decisions of other courts that have already considered the adequacy of arbitration as an administrative remedy in the face of a constitutional attack on the Amendments Act. *See Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982) (it would be futile to compel exhaustion where plaintiff mounted a facial challenge to the Amendments Act); *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1038 & n.27 (N.D. Ill. 1982) (where plaintiffs brought a facial challenge to the statute, the lack of a factual record and the possibility of an exemption did not bar action on ripeness grounds).[8]

IV. RETROACTIVITY

Having concluded that the district court had jurisdiction to consider the constitutional challenge to the Amendments Act, we now turn to the issue of whether retroactive application of the Act violates due process. We have reviewed opinions on both sides of the issue.[9] We recognize that the Amendments Act comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). We also recognize that "[t]he due process clause

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[8]We agree with the court in *Republic* that where the exhaustion doctrine is inapplicable, we need not consider the trust's argument that this case falls within one of the exceptions to the exhaustion doctrine. 693 F.2d at 298.

[9]In addition to the well-reasoned opinions of Judges Hill and Redden, a thorough discussion of the issue may be found in *Peick v. Pension Benefit Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982). Judge Getzendanner concludes in *Peick* that although "this is an extremely close call", *id.* at 1056, retroactive application of the amendments Act is constitutional. *But see Sibley, Lindsay & Curr, Co. v. Bakery, Confectionery and Tobacco Workers Int'l Union*, F. Supp. No. Civ. 82-555T (W.D.N.Y. Mar. 16, 1983), in which the court *held that retroactive application of the Act is unconstitutional.*

does not make unconstitutional every law with retroactive effect'' and that ''[o]nly when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded.'' *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated on other grounds*, 430 U.S. 952 (1977). We find, however, that the retroactive burden imposed by the Act on plaintiffs-employers is constitutionally invalid.

An analysis of the retroactivity issue must begin with a review of congressional goals in enacting the Amendments Act and a brief legislative history of the Act.[10] As enacted in 1974, ERISA provided that before January 1, 1978, payment of guaranteed benefits earned by employees in multiemployer plans was made at the discretion of the Guaranty Corporation. 29 U.S.C. § 1381(c) (1976). On January 1, 1978, payment of guaranteed benefits for terminated multiemployer plans was to become mandatory. In 1977, Congress expressed concern about the effect, particularly the cost, of implementing the mandatory guarantee. It therefore delayed the effective date of the mandatory guarantee program and ordered the Guaranty Corporation to submit a report on multiemployer plans. *See Peick v. Pension Benefit Guaranty Corp.*, 539 F.Supp. 1025, 1030-31 (N.D. Ill. 1982). Over the course of the next few years, while Congress debated the issue of multiemployer plan termination, the effective date of the mandatory guarantee program was extended three more times in anticipation of legislative changes in ERISA's multiemployer plan provisions. *Id.* at 1032-33.

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[10]For an extensive discussion of the legislative history of the Amendments Act, *see Peick*, 539 F.2d at 1029-34.

The Guaranty Corporation's study, submitted to Congress on July 1, 1978, reported that ERISA might encourage termination of multiemployer pension plans. The Corporation suggested that since mandatory termination insurance would protect virtually all vested benefits in multiemployer plans, employers, whose liability was contingent and limited to thirty percent of their net worth, might choose to terminate their plans. Active employees might also desire termination where a high proportion of pension contributions was being used for retirees' benefits. The Guaranty Corporation feared that these combined economic advantages might act as an incentive to plan termination. *Id.* at 1031-32 (quoting Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 23-24 (1978)). On February 27, 1979, the Corporation submitted a legislative proposal advocating certain changes in ERISA designed to diminish that incentive. Legislation was formally introduced on May 3, 1979.

The 1979 legislative proposal eventually became the Amendments Act. When the bill was first introduced, the withdrawal liability rules were given an effective date of February 27, 1979, the date the proposal was first submitted by the Guaranty Corporation. In June 1980, the Senate Finance Committee determined that the February 27, 1979 date was unnecessarily harsh, and changed it to April 29, 1980, the date eventually enacted into law. *Id.* at 1053. The Act was finally signed into law on September 26, 1980.

In determining the validity of the retroactive provision, Judge Hill and Judge Redden followed the analysis used by the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). The issue presented in *Nachman* was whether the retrospective imposition of employer liability authorized by ERISA

superseded a liability exclusion clause included in the single employer's pension plan. The court examined four factors for the purpose of determining whether the employer was subject to liability. The factors were: (1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. Applying that test the *Nachman* court held that the employer was liable. Although the case did not involve a retroactive effective date, we agree that the *Nachman* test applies here, and we shall discuss each of the factors as applied to the retroactive imposition of the withdrawal liability required by the Amendments Act.

A. RELIANCE INTERESTS

This factor weighs in favor of Shelter Framing, G & R, and R.A. Gray ("the employers"). They all withdrew from their multiemployer plans before the date the Amendments Act was enacted. It was not certain at the time they withdrew that the Amendments Act would be enacted and would have a retroactive effect. We reject the argument that the employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. *See Peick*, 539 F.Supp. at 1053. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the Amendments Act to pass. It would have been impossible for anyone to predict with accuracy the final outcome of the legislative process. The employers therefore relied reasonably upon their collective

bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA.

The law here operates to the severe detriment of the employers, and we believe their reliance on the prior law to be the most relevant reliance interest to be considered. Yet we recognize as well that *Nachman* suggests consideration should be given to the reliance interests of other parties.

Employees expecting benefits under their multiemployer plans have an interest in the financial health of their plans. Their interest, however, goes more toward the solvency of the multiemployer plan as a whole than toward the individual contributions of a single employer, and this does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability. There is no reason to believe that employee significantly relied for the financial health of the multiemployer plans on the increased termination liability imposed by the Amendments Act on those employers who withdrew between the effective date of the Act and the date of enactment. For example, the withdrawal liability imposed on the employers here is relatively insignificant in terms of the plans' total unfunded vested benefits liability. Judge Hill found that the employers' failure to pay their withdrawal liability caused Carpenters Pension Trust no clear or immediate harm. The trust fund and covered employees have not relied heavily on these employers' contributions, and thus their interests do not outweigh the reliance interests of the employers.

The *Nachman* court put greater emphasis on employee interest, but that case is different. *Nachman* involved a single employer pension plan, thus the employees had a far greater interest in the contributions of one employer. Furthermore, the employer in *Nachman* terminated after the enactment of ERISA. The employers in these cases, having

withdrawn before enactment of the Amendments Act, were not given the opportunity to make such an educated choice. There were alternative actions the employers might have taken to avoid withdrawal liability had they known about their exposure to withdrawal liability had they known about their exposure to withdrawal liability under the Amendments Act. For example, they might have renewed their collective bargaining agreements and continued to contribute to the plans. They might have gone out of business completely, or sold their assets to a company which participated in the plan. We conclude that the reliance factor weighs against the retroactive application of the statute.

B. PRIOR REGULATION

This second factor, whether the interests impaired by the retroactive application of the Act were previously subject to regulation, is another facet of reliance. Where parties engage in a regulated business, they should reasonably anticipate some modification of the scope of regulation. In *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32 (1940), the Supreme Court emphasized the importance of prior state regulation in upholding a New Jersey law which was more restrictive than its predecessor. The plaintiff purchased shares in a savings and loan when state law allowed for a later turnback or redemption of those shares. After his purchase, the law was changed to restrict the conditions of redemption. The funds from which defendant was allowed to redeem shares were defined more narrowly, and early redeemers were given less priority on their turned-back shares. The Court stated:

> It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject

to further legislation upon the same topic.

Viex, 310 U.S. at 38 (footnote omitted).

Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974. Subjecting parties to some risk of further regulation should not, however, require them to anticipate drastic legislative changes which extract a heavy fine for action taken before the changes win congressional approval. Parties can reasonably be expected to adjust their behavior in accordance with legislation which clarifies or modifies existing restrictions. In *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84 (1958), the Supreme Court upheld an amendment to regulations regarding rental of property financed by federally insured loans. The Court said that in amending the law, Congress was articulating a construction of the law which it had already accepted under the original language. Thus the amendment was a clarification of, not a drastic change in, the existing law. In contrast, the retroactive application of the Amendments Act goes far beyond a clarification or modest modification of ERISA. The Act imposes a much heavier burden on withdrawing employers than had been imposed by ERISA. The fact of prior regulation in the pension plan area weighs in favor of retroactive application, but does not sway us from our conclusion that such application of the Act impaired the employers' reliance interests to an unduly harsh degree.

C. EQUITIES

Here we confront the difficult task of weighing the individual burdens on the withdrawing employers against the policies Congress hoped to further by establishing a retroactive effective date for the Amendments Act. We approach our task sensitive to the historical development of judicial review of economic legislation.

The Supreme Court expressed its disfavor of retrospective legislation in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). At issue in *Alton* was a federal law requiring the railroads to establish a pension fund which would cover current employees and those who had worked for the railroad within the year before the law was adopted. The law also provided certain benefits to employees who left the railroad service and later returned. The Court held that the statute violated the due process clause, because it arbitrarily imposed additional liabilities on employers for transactions long ago closed and fully compensated. 295 U.S. at 353-54.

The reluctance of the Court in *Alton* to defer to legislative judgment is generally associated with the era of the Court's vigorous protection of economic interests on constitutional grounds. The decision, however, has never expressly been overruled. It was narrowed by the Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, Congress passed a law providing benefits to coal mine workers who suffered from black lung disease. Amendments to the statute increased miners' benefits, which were paid in part by coal mine operators. The operators challenged the retrospective effect of the statute, arguing that it violated their due process rights because it required the operators to pay benefits to miners who had left their employ before the effective date of the act. The Court held the act valid as a rational means by which to spread the costs of mine workers' disabilities.[11]

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[11]A similar result was reached by this court in *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899 (9th Cir. 1979). There the court held that a provision of the Longshoremen's and Harbor Workers' Compensation Act which allows for payment of death benefits if an employee who sustains permanent total disability due to injury thereafter dies from causes other than the injury applies to claims based upon a death which occurred after the effective date of the statute, even though the injury occurred before the effective date. The court rejected the argument that the statute violated due process, finding that the survivors' rights in death benefits first vested upon the employees' death, after the effective date of the statute. *Id.* at 902.

Turner Elkhorn Mining suggested that the Supreme Court favors great deference to Congress' judgment in allocating economic benefits and burdens, even where legislative schemes impose significant hardships on some individuals. The more recent case of *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), restricts the degree of that deference. *Allied Structural Steel* involved a Minnesota law which provided protection to employees covered under private pension plans. Under plaintiff-employer's plan, certain employees did not have vested rights until they had worked fifteen years for the employer. Under the statute, employees needed only ten years of service to qualify as pension obligees. The Court held that the statute violated the contract clause because, *inter alia*, the law "worked a severe, permanent, and immediate change" in the contractual relationships, it worked unfairly against those who voluntarily had established pension plans, and it regulated a field not previously regulated by the state. 438 U.S. at 250.[12]

This case shares with *Alton* and *Allied Structural Steel* a harsh burden imposed upon the employers for completed transactions. The effective date of the Act was arbitrarily fixed. The employers are required now, after making the measured decision to withdraw from their plans, to pay a sum that seriously threatens their solvency, without a spe-

[12]The Supreme Court has not expressly stated that the contract and due process clauses impose identical restraints on the legislative impairment of contracts. Considerations similar to those examined in contract clause analysis, however, may apply to the federal government through the due process clause. We have in the past confirmed the concurrent scope of the protection afforded by these provisions:

> [T]he Fifth Amendment's due process clause provides essentially the same restraint against federal impairment of the obligation of contracts [as the contract clause].

Northwestern Nat'l. Life Ins. Co. v. Tahoe Regional Planning Agency, 632 F.2d 104, 106 (9th Cir. 1980); *see also Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 904 (9th Cir. 1979) (Sneed, J., concurring).

cific showing of proportionate need on the part of the pension trust funds.

This burden on the employers lacks the justification present in *Turner Elkhorn Mining*. There the Supreme Court found

> that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers.

Turner Elkhorn Mining, 428 U.S. at 18. In contrast, here there were no hidden risks, such as those of black lung disease, constituting a rational basis to alter drastically the expected economic balance.

In distinguishing *Allied Structural Steel* from the facts in *Nachman*, the Seventh Circuit emphasized that Title IV of ERISA "represent[s] a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose." 592 F.2d at 962. The same cannot be said of the retroactive application of the Amendments Act. The withdrawal liability imposed on the employers for their pre-Amendments Act termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans. Those withdrawing prior to enactment of the Amendments Act were still contingently liable under ERISA. Additionally, employers could have been required to post a bond upon their withdrawal, or the withdrawal liability provisions of ERISA, while still contingent, could have been modified to provide a more secure "safety net" in the event a particular pension plan failed. Keeping in mind that we refer only to those employers who withdrew in the brief period between April 29, 1980 and September 26, 1980, and balancing the

benefits to the multiemployer plans of imposing liability over and above the contingent liability already lawfully imposed by ERISA against the burden on the employers, we conclude that the equities weigh against retroactive application of the Amendments Act.

D. MODERATING PROVISIONS

The absence of moderating provisions in the Amendments Act as applied retroactively is the most significant distinction between this case and *Nachman*, 592 F.2d at 962-63. The Amendments Act does not contain three major moderating provisions of ERISA: the contingent nature of the liability, the cap on payments placed at thirty percent of an employer's net worth, and the calculation of liability based on only the amount guaranteed by the Guaranty Corporation, not the full value of the employees' vested benefits. The Amendments Act nevertheless offers several mitigating provisions of its own. A mandatory "de minimis" exemption excuses in general all assessments under $50,000.00. 29 U.S.C. § 1389(a) (Supp. V 1981). A higher exemption is available if the trustees opt for it in their discretion. *Id.* at § 1389(b) (Supp. V 1981). Withdrawal liability is payable over time according to a schedule prescribed by statute. *Id.* at § 1399(c)(1) (Supp. V 1981). Liability is limited to the first twenty annual payments if more than twenty years are needed to amortize an employer's withdrawal liability. *Id.*, at § 1399(c)(1)(B) (Supp. V 1981). Liability is reduced if the employer withdraws because it has liquidated or dissolved its business. *Id.* at § 1405 (Supp. V 1981).

We find little, if any, comfort for the employers in these provisions. The de minimis exemption may well be inapplicable, as it is here, and the further exemption can only be exercised by the trustees. The employers could not with

certainty predict the form and passage of the Act, thus they could not choose to go out of business, or sell to a buyer in the industry. The twenty-year restriction, which does little to mitigate a large withdrawal liability, is inapplicable. The assessment of liability in monthly installments, as opposed to a lump sum payment, fails to mitigate the burden where the monthly payments would take an unreasonable amount of the employers' income. Finally, it is not clear, as Carpenters Pension Trust claims, that if the employers rejoin the plan, their liability would be abated or eliminated. Even assuming that the employers could rejoin their plans, pursuant to new collective bargaining agreements, the Guaranty Corporation has not yet adopted regulations regarding the possible reduction or waiver of liability where a former participant rejoins a plan.

We hold that retroactive of the Amendments Act violated the employers' rights to due process as guaranteed by the fifth amendment. We take special care to note that our holding applies only to those employers who withdrew before the enactment of the Amendments Act, but after the effective date of the Act. We express no opinion as to the constitutionality of the imposition of liability on employers who withdrew after September 26, 1980.

Since we find that the retroactive application of the Act is constitutionally invalid, we need not reach the issue of whether the imposition of liability constitutes a taking for which compensation is required, or any of the other numerous issues raised by the parties other than the award of attorney's fees.

V. ATTORNEY'S FEES

The district court in *Shelter Framing* and related cases awarded attorney's fees under 29 U.S.C. § 1451(e) (Supp. V 1981).[13] The Act provides for award of fees to a party "who is adversley affected by the act or omission" of another party with respect to a multiemployer plan. The trust contends that it did nothing other than carry out the obligations imposed by the Amendments Act, thus it did not act or omit to act under its construction of the statute. The statute, however, contains no language which would restrict the terms "act or omission of any party" to conduct which is in violation of the provisions of the statute. We therefore hold that the language of the statute is broad enough to include an award for vindication of constitutional rights. The act of imposing substantial withdrawal liability upon the employers adversely affected them. Since Shelter Framing and G & R were clearly the "prevailing parties", they were entitled to attorney's fees in the discretion of the district court. *See Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452-53 (9th Cir. 1980). We find no abuse of discretion and affirm the award. We also grant attorney's fees on appeal under 29 U.S.C. § 1451(e) to Shelter Framing and G & R,

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[13] The relevant sections read in pertinent part:

> (a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(Supp. V 1981).

> (e) Costs and expenses. In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

29 U.S.C. § 1451(e) (Supp. V 1981).

who requested such fees.[14]

The judgments in appeal numbers 82-5271, 82-5272, 82-5460 and 82-5461 are AFFIRMED. Our affirmance in appeal number 82-5461 disposes of the issues raised in cross-appeal number 82-5462, and we do not reach the contentions therein. The judgment in appeal number 82-3506 is REVERSED.[15]

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[14]Appellant R.A. Gray made no request for attorney's fees on appeal. *See* 9th Cir. R. 13(b)(1)(E).

[15]Attorneys for G & R moved this court for sanctions against the Guaranty Corporation for alleged violation of Fed. R. App. P. 28(j) and 9th Cir. R. 13(g). We find no impropriety and deny the motion.

APPENDIX B.

Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5460

SHELTER FRAMING CORPORATION,

Plaintiff/Appellee,

vs.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendant/Appellant.

No. 82-5461

G & R ROOFING COMPANY,

Plaintiff/Appellee,

vs.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendant/Appellant.

Filed: September 13, 1983.

Judges Wright, Kennedy and Boochever vote to deny the Petition for Rehearing and to reject the Suggestion for Rehearing En Banc filed by Carpenters Pension Trust for Southern California.

APPENDIX C.

Opinion.

Nos. CV 81-4457-IH.
CV 81-5551-IH.

SHELTER FRAMING CORP.,

Plaintiff,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant.

G & R ROOFING COMPANY,

Plaintiff,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant.

United States District Court, C. D. California.

July 9, 1982.

Irving Hill, District Judge.

PRELIMINARY STATEMENT

In this Opinion, the Court holds unconstitutional certain provisions of the Multiemployer Pension Plan Amendment Act, 29 U.S.C. Sec. 1381 ff. (MPPAA), as applied to each Plaintiff. The Plaintiffs are employers who withdrew from a pension plan covered by the Employees Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1001 ff., prior to the enactment of MPPAA. Under the retroactive provisions of the new statute, they were assessed a substantial liability, and they sued for declaratory and injunctive relief. The Plaintiffs sought a declaration that the statute and the assessments made thereunder were unconstitutional. They also sought an injunction prohibiting collection of the assessments.

The two cases, by agreement of all parties, were consolidated for discovery and pre-trial purposes. Preliminary injunctions, enjoining further efforts to collect the assessments, were entered in both cases on January 14, 1982. Thereafter, both sides in both cases filed simultaneous mutual summary judgment motions on the issue of MPPAA's constitutionality.[1] Argument on the motions in the two cases was consolidated.

Plaintiffs challenge the validity of the statute on a number of separate grounds. As will be seen, those challenges are rejected on certain of the grounds but are sustained on the issue of retroactivity. The Court does not reach the issue of taking without just compensation.

The Opinion which follows was delivered piecemeal, orally from the bench, on March 22, 23 and 24, 1982. As an oral opinion, it does not purport to be a full and comprehensive discussion of all of the applicable case law bearing on all of the issues adjudicated. The Court's oral remarks have been somewhat edited for publication and, in the interest of clarity, a few minor additions have been made.

FACTS

Counsel for all of the parties have stipulated in open court that there are no disputed issues of material fact and that the only questions presented by the mutual summary judg-

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[1]Prior to the argument of the mutual summary judgment motions, the Court recognized Pension Benefit Guaranty Corporation, a government agency created under ERISA, as an amicus curiae. Its representative appeared and asserted in briefs and argument that the Court had no jurisdiction to adjudicate the constitutional validity of MPPAA before the Plaintiff-employers had availed themselves of the statutorily-provided arbitration procedure. MPPAA provides for arbitration to resolve disputes or objections by withdrawing employers over the existence or amount of withdrawal liability. This threshold issue was argued, and was rejected by the Court, before commencement of the hearing on the constitutional issues. Thereafter, the amicus orally argued the constitutional issues.

ment motions are questions of law. They have also agreed that the matter is ripe for decision now as to the constitutional issues, and no trial on those issues is necessary or appropriate. The lawyers have filed an extensive set of stipulated facts. Other facts not covered in that stipulation emerged during the argument as being uncontroverted and they, too, have been considered by the Court. The following is a summary of the relevant uncontested facts.

Both Plaintiffs are contractors in the construction business. Plaintiff Shelter was party to a collective bargaining agreement with a local of the Carpenters Union from 1976 to 1980. As required by the agreement, Shelter contributed to the Defendant Carpenters Pension Trust (Trust), throughout that period. Shelter's union contract expired July 1, 1980, and negotiations for a new agreement reached an impasse on July 16, 1980. Shelter had no obligation to continue its contributions to the Trust after July 16, 1980, but in fact made payments until August 12, 1980. These dates place Shelter's withdrawal from the plan[2] well before September 26, 1980, the enactment date of MPPAA, but after the retroactive application date of April 29, 1980, set by the statute.

After this withdrawal, the Trust assessed against Shelter a lump sum withdrawal liability of $797,648. This is more than twice Shelter's net worth. As authorized by the statute, the Trust established a monthly payment schedule of $22,737 per month for 40 months, totalling $922,489, which includes interest. These monthly payments amount to $272,850

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[2]An employer is deemed to make a "complete withdrawal" from a multi-employer pension plan when the employer permanently ceased to have an obligation to contribute to the plan. 29 U.S.C. Sec. 1383. Thus, Shelter completely withdrew from the plan on July 16, 1980, or at the very latest on August 12, 1980. Similarly, G & R completely withdrew on July 18, 1980, or, at the very latest, on August 12, 1980.

per year, a sum which exceeds 60% of Shelter's net worth. The first monthly payment was due June 24, 1981. When Shelter did not make that payment, the Trust declared Shelter in default and thereafter accelerated the total liability. Thus, the monthly payment is no longer available to Shelter, and Shelter is currently obligated to pay the original lump sum of $797,648.

Plaintiff G & R was party to a collective bargaining agreement with the same local of the Carpenters Union from 1972 to 1980 and contributed to the Defendant Trust throughout that period. The collective bargaining agreement expired July 1, 1980, and renewal negotiations reached an impasse on July 18, 1980. G & R was not obligated to contribute to the Trust after July 18, 1980, but did in fact continue its contributions until August 12, 1980. The date of G & R's withdrawal from the plan is thus also well before the enactment date of MPPAA, September 26, 1980, and after its retroactive application date of April 29, 1980.

The Trust assessed a lump sum withdrawal liability against G & R in the amount of $687,387. That sum is equivalent to 40% of G & R's net worth. The Trust, acting under the statute, established a monthly payment schedule of $17,397 per month for 45 months commencing November 5, 1981. The monthly payments amount to $207,773, which would equal 84% of G & R's net income for the year 1980. Because of the preliminary injunction issued by this Court, the Trust has taken no steps to accelerate the liability and has not yet declared the full original sum of $687,387 due and payable.

THE STATUTE

I think I should begin with some brief remarks about the background of the statute and the statutory objectives.

MPPAA is an amendment to a statute passed some years earlier, the Employees Retirement Income Security Act, 29

U.S.C. Sec. 1001 ff. (ERISA). ERISA was an effort by Congress to regulate and govern the conduct and administration of employee pension plans. The Act set up duties and obligations to the beneficiaries of such plans, and gave recourse to the federal courts to participate and beneficiaries who claimed abuses and maladministration.

Along with ERISA, Congress established the Pension, Benefit Guaranty Corporation (PBGC) to help insure that vested rights of beneficiaries in these plans would be vindicated, and that vested obligations would be met in cases of financial difficulty.

ERISA included an initial limited approach to the problems that might be encountered when employers in multiemployer pension plans withdrew from such plans. It established a contingent obligation on the part of withdrawing employers to pay a proportionate share of the sums needed to cover vested benefits if the plan were to become insolvent during the 5-year period following withdrawal. 29 U.S.C. Sec. 1365. "Substantial" employers who withdrew were required to post a bond to meet this contingent liability. If the plan remained solvent for five years, the withdrawing employer paid nothing. Employers could purchase insurance from PBGC to protect themselves from the contingent liability which could ensue if the plan failed within 5 years. 29 U.S.C. Sec. 1323.

As to MPPAA, the parties have furnished a great deal of material from its legislative history. That material is not controverted and is contained in the stipulation of undisputed facts. The material is also a public record, so I could take judicial notice of it. From that material, the following things can be extrapolated.

The principal purpose of MPPAA, as enunciated to Congress in a report from the PBGC, was to reduce the incentive

of employers to terminate their affiliation with multi-employer pension plans by making it more onerous and costly for them to withdraw.

PBGC was concerned with the drain on its own finances which might result if it, as an insurer, had to make good on promised benefits in many plans following withdrawal by numerous employers. PBGC was also concerned with the increased financial burden created by such withdrawals upon those employers who remained, as this increased burden in turn created a greater incentive for the remaining employers to withdraw.

The statute that Congress passed under this impetus from PBGC is an extremely lengthy and complex one. The statutory scheme may be summarized in a bare-bones fashion this way:

Whenever an employer has made a complete withdrawal from a multi-employer pension fund, the fund is required to compute the withdrawing employer's proportion of the unfunded vested benefits of that fund. Each employer's share is based on the proportion of its contributions to the fund over the past five years relative to all of the contributions received by the fund during those five years.

The sum so computed becomes an obligation of the withdrawing employer to the fund. That sum bears interest from the time it is assessed until it is paid. If the employer goes 60 days without paying the amount assessed, following written notice of non-payment, the Trust may declare the full amount of the liability due and payable.

The withdrawing employer is given an option of paying the liability assessed to him in monthly installments as prescribed by the pension plan trustees; but to have this option, the first installment must be paid within 60 days of notice

of the amount due.[3]

If the employer is unhappy with the amount assessed against him, he may, under certain conditions, have the matter reviewed in arbitration proceedings. He must, however, pay the first monthly installment and continue paying monthly installments during the arbitration process.

One of the aspects and facets of MPPAA which may well be central to the issue of its constitutionality, at least for the purposes of this case, is that it was enacted on September 26, 1980. But by the statute's own wording and terms, it purports to be retroactively applicable to employers who withdrew from multiemployer funds prior to that date. 29 U.S.C. Sec. 1461(e)(2)(A). It purports to impose the liability that I have described on any employer who withdrew after April 29, 1980, up to and including the enactment date of September 26, 1980. Of course, it also imposes that liability on any employer who withdrew after September 26, 1980. Both of the Plaintiffs in our cases withdrew after April 29, 1980, but before the enactment date of the statute. See footnote 2, supra.

Both Plaintiffs were operating under collective bargaining agreements which required them to make contributions to the fund. The collective bargaining agreements explicitly stated that the employer would not incur any further or future liability whatsoever if it should cease making contributions to the fund when it ceased to be bound by the collective bargaining agreement. Before MPPAA's enactment date,

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[3]I note that PBGC claims to have adopted an "interpretation" of MPPAA which prohibits a declaration of accelerated liability under cetain circumstances. But there is no probative evidence of the existence of such a regulation before the Court. I have not seen a PBGC document or any indication that such a regulation has been validly and properly issued, or that its issuance would be within PBGC's powers under the statute. I note it only as an unsupported claim made by PBGC.

both Plaintiffs properly ended their adherence to their collective bargaining agreements and thus terminated their obligations to continue making further contributions to the fund. Both Plaintiffs concede that under the law as it read at the time of their withdrawal, they incurred the contingent "five year" liability provided in ERISA and discussed above.

This general description is sufficient to set the stage. I will summarize in more detail other provisions of the statute which may be directly applicable to specific constitutional attacks. I now proceed to a discussion of the separate specific constitutional challenges made by Plaintiffs.

EXHAUSTION OF REMEDIES

Plaintiffs have come directly to this Court, seeking declaratory relief in the form of a holding that MPPAA is unconstitutional, and seeking an injunction against the enforcement of the withdrawal liability asserted by the Trust. PBGC argues that this Court should require exhaustion of the administrative remedy of arbitration before considering the constitutional challenges and that this Court lacks jurisdiction to decide the constitutional issues now. PBGC's request that constitutional adjudication be deferred pending arbitration is denied.

Whether PBGC's exhaustion argument is viewed as jurisdictional or discretionary, it is rejected. I hold that the Court has jurisdiction to adjudicate the constitutionality. And, if the matter involves the exercise of discretion, the Court, in its discretion, declines to defer adjudication of constitutionality pending recourse by Plaintiffs to arbitration.[4]

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[4]One court has required a plaintiff-employer to exhause the arbitration remedy before seeking judicial relief and a declaration of unconstitutionality. Republic Industries v. Central Pennsylvania Teamsters Pension Fund, 534 F.Supp. 1340, 3 E.C.B. 1299 (E.D. Pa. 1982) (order granting motion to dismiss).

Let me first discuss the claim that the Court lacks jurisdiction at that point to proceed to a constitutional adjudication. PBGC relies on decisions of our Circuit in Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978), and Eluska v. Andrus, 587 F.2d 996 (9th Cir. 1978). These cases contain language that could be interpreted as saying that failure to resort to administrative remedies deprives the District Court of jurisdiction. But on the facts of each case, such language seems too broad. The principle for which those cases actually stand is that if one approaches the Court for a form of relief which is within the scope of a statutorily madated administrative procedure, the Court should not, ought not, and cannot grant such relief until that administrative remedy is availed of. That rule of law is simply inapplicable to the present cases and the present facts.

Plaintiffs here challenge the constitutionality of the statute. All of the parties agree that the statutory arbitration proceeding cannot adjudicate constitutional challenges. As I understand its position, PBGC also seems to agree that the arbitrators could not adjudicate the constitutional challenges.

If Plaintiffs were in this court trying to challenge the manner in which their obligation to the Fund was computed, or whether they had in fact withdrawn, or certain other disputes within the general framework of the statute and thus arbitrable under the statutory scheme, we might have a different case, and the arbument that this court has no jurisdiction might have some force. But that is not the type of challenge that these Plaintiffs have made. They challenge the basic structure and basic constitutionality of the statute.

PBGC also makes what I regard as a different kind of argument, perhaps not even a jurisdictional one. PBGC says that under general principles of law, the Court should require the arbitration, because to do so could have many beneficial

results of which the Court should avail itself before embarking on constitutional adjudication.

PBGC says that arbitration could possibly eliminate the dispute entirely, or permit resolution of it on nonconstitutional grounds, or present to the Court a better record on which constitutional adjudication could be made. Arbitration says the agency, would permit the Court to have the benefit of the agency's expertise as to what the statute means.

In certain cases such considerations might well be worthy of serious thought and notice, and might conceivably result in a court declining to make a constitutional adjudication. But those arguments and those considerations are simply not applicable to the present cases. We are dealing here with a straight legal constitional challenge. Agency expertise is meaningless and of no relevance as applied to the type of challenge these Plaintiffs pose. The only expertise an agency like PBGC might possess is expertise on how the statute is to be applied and administered. That could not aid the Court in deciding a frontal challenge of this type.

Moreover, since the challenges made here are not within the scope of the arbitration, there could be no help in the adjudication of these challenges from any record that an arbitration procedure would create. As far as I can see (and I note that the parties agree with me), there is no possibility that factual findings within an arbitration could moot these constitutional challenges. As the parties agree, there is zero possibility that the assessed liability could be eliminated in an arbitration. And the possibility that the liability of each Plaintiff could even be very materially reduced is remote indeed, if not entirely non-existent. Challenges such as these Plaintiffs made, based on retroactivity, denial of right to jury trial, access to a court, and others, simply could not be mooted by an arbitration.

I am not impressed with the assertion that arbitration would develop a better record for adjudication of these constitutional issues. We have a clear factual record here now. As I see it, there would be no benefit in developing further facts through the arbitration. And I cannot see the possibility of getting any additional facts through the arbitration that would affect the Court's duties as a constitutional adjudicator.

There is ample case law to the effect that when one is challenging the basic statute, the basic administrative framework, there is no duty to exhause administrative remedies. Among those cases in our own Circuit are Downen v. Warner, 481 F.2d 642 (9th Cir. 1973), and Montana Chapter of Association of Civil Technicians, Inc. v. Young, 514 F.2d 1165 (9th Cir. 1975).

The doctrine of exhaustion is not an absolute rule, and not a sine qua non. There are well-known exceptions. If exhaustion would be futile, one need not exhause. Where administrative remedies would be inadequate or inefficacious, one need not exhause. These exceptions and the case law supporting them are well set out in Aleknagik Native Ltd. v. Andrus, 648 F.2d 496 (9th Cir. 1980), and in Winterberger v. General Teamsters Auto Truck Drivers, Local Union 162, 558 F.2d 923 (9th Cir. 1977).

As in Winterberger, the challenge here goes to the whole statute. The basic fairness of the entire administrative structure is challenged on due process, equal protection, and other fundamental grounds. I think the Winterberger rationale applies here.

There is no statutorily mandated exhaustion requirement in MPPAA for the type of challenges made to this Court. Even if, arguendo, I construed the statute as containing an exhaustion requirement, I read the cases just mentioned as indicating that a stautorily mandated exhaustion requirement

is subject to the same exceptions I have just mentioned, and this case comes within those exceptions.

One other factor is important. To make these Plaintiffs go through the complex, time-consuming, and very expensive process of arbitration to determine the actuarial bases, the accounting bases, and other questions they might be impelled to raise as to the way their liability was calculated, would be unfair and wasteful when arbitration could not adjudicate their principal grievance, which is that the basic statutory scheme is unconstitutional. There is simply no public interest to be served by imposing this barrier before addressing Plaintiffs' assertions of unconstitutionality. To impose such a requirement under the circumstances of these cases would, in my view, be totally unreasonable.

CONSTITUTIONAL ISSUES

Before I commence a discussion of the separate type of challenges which Plaintiffs have made, I think it is worthwhile to restate some general principles which every court must observe in adjudicating challenges to the constitutionality of legislation.

Legislation is, of course, presumed to be constitutional, and the challenger has the burden of demonstrating its unconstitutionality. Statutes should be construed wherever possible so as to uphold their constitutionality. Since we deal with legislation in the economic area, and not with criminal or First Amendment legislation, special deference must be paid to Congress' judgment. Generally speaking, economic legislation should be upheld if it bears a rational relationship to a legitimate governmental interest.

Plaintiffs present their constitutional challenges on many grounds, and I have grouped them in the following way for purposes of convenience:

First, void for vagueness.

Second, denial of equal protection.

Third, fourth and fifth (to be considered together), denial of an impartial tribunal, denial of access to the courts, and denial of the right to jury trial.

Sixth, a challenge based on taking of property without a hearing.

Seventh, void for retroactivity.

Eighth, a challenge based on taking of property without just compensation.

All the challenges, except for the ones based on denial of equal protection and denial of the right to jury trial, are due process challenges.

I will first announce my ruling with respect to those challenges which I regard as less substantial. Those include vagueness, taking without a hearing, equal protection, and the challenges based on denial of access to the courts, impartial tribunal and jury trial.

(A) Vagueness

The first issue to be addressed is vagueness. Vagueness challenges have their greatest impact on First Amendment legislation, on criminal legislation, and on certain civil legislation which imposes penalties. In the First Amendment area, the concern is that vague legislation has a chilling effect which can be much too broad if the legislation is not precisely drawn. Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Ashton v. Kentucky, 384 (U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). In criminal cases, and where a civil statute imposes penalties for prohibited conduct, the general rule is that one is entitled to reasonable notice and reasonable definition of what the prohibited conduct is. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). The

entire vagueness concept is based on fairness and notice.

In legislation involving economic regulation, less precision is required. The courts recognize that legislatures, including Congress, cannot dot every "i" and cross every "t", and that they need only define the scope of their edict so far as is practicable and feasible. The courts have said many times that legislatures must deal with numerous and unforeseen variations in factual situations and for that reason are permitted, in economic areas, to use general and imprecise language.

With respect to economic legislation, many extremely vague phrases have withstood constitutional challenges. Among the significant cases are: United States v. National Dairy Products Corp., 372 U.S. 29, 29-30, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) ("unreasonably low prices"); Boyce Motor Lines v. United States, 342 U.S. 337, 339, 72 S.Ct. 329, 330, 96 L.Ed. 367 (1952) ("so far as practicable and where feasible"); Sproles v. Binford, 286 U.S. 374, 393, 52 S.Ct. 581, 587, 76 L.Ed. 1167 (1932) ("shortest practicable route"); diLeo v. Greenfield, 541 F.2d 949, 955 (2nd Cir. 1976) ("other due and sufficient cause"), Brennan v. Occupational Safety & Health Review Commission, 505 F.2d 869, 872 (9th Cir. 1974) ("near proximity:).

Among the statutory terms which Plaintiffs challenge as invality vague are "building and construction industry," and the classification of employers covered by MPPAA as those where "substantially all" of the employees continue to perform work "in the jurisdiction of the collective bargaining agreement". 29 U.S.C. Sec. 1383(b). These terms do not seem to me to be constitutionally vague at all. In any event, Plaintiffs do not contend they are vague as applied to them. There is no question that Plaintiffs are construction contractors and are covered by the statute. There is no question that Plaintiffs withdrew from the Trust Fund,

and that they continue to work in the regulated field. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974).

Plaintiffs also mention alleged vagueness in the parts of the statute defining the actuarial assumptions to be made by the Trust in fixing a withdrawing employer's obligation. On that subject, the statute contains six pages of instructions, and that can hardly be called vague.

Overall, this act is about as clear as it can be, and certainly as clear as it needs to be by law. It would be impossible for Congress to predict and codify completely and exactly all of the factual situations which human experience could manufacture. Thus, in my opinion, the challenge for vagueness must be rejected.

(B) Equal Protection

I proceed now to the equal protection challenge.

Plaintiffs argue that 29 U.S.C. Secs. 1461(f)(1) and (f)(2), when read in conjunction with 29 U.S.C. Secs. 1461(e)(2)(A) and 1363, establish an irrational distinction between substantial and nonsubstantial withdrawing employers. Plaintiffs claim that they are non-substantial employers and that they are discriminated against under these statutory sections, and are treated so unequally as to amount to a denial of equal protection under the Constitution.

To state my conclusion first, I think that the equal protection challenge must be rejected as moot. It turns out that there is no one in the group which Plaintiffs say was more favorably treated. The undisputed evidence is that there were no substantial employers in any multiemployer plans anywhere in the country who withdrew between April 29 and September 26, 1980. That group is finite and is known to us now, and it is clear that there is no employer in a position

to receive more favorable treatment under these sections.

Although I have rejected this challenge as moot, I will review the parties' arguments. Shelter argues that MPPAA treats substantial employers who terminated before the enactment date, but after April 29, 1980, more favorably than non-substantial employers. To buttress this challenge, Shelter interprets the statute in an unusual way. It asserts that a substantial employer who terminated in that period is permitted to post a bond and escape all further liability if the trust remains in existence for five years. Plaintiffs say, in effect, that for substantial employers the old law simply carried over until September 26, 1980.

The Trust and PBGC dispute that interpretation. Defendant says that the statute should be read otherwise, that substantial employers in this time window have the same amount and degree of liability as non-substantial employers; that they, too, must pay their pro rata share of what the Trust believes will be necessary to meet the promises and assurances of the Trust in the future. In fact, Defendant says that the statute imposes a heavier burden on substantial employers; namely, the burden of posting a bond to assure they will make the necessary payments. This bond, they point out, is a requirement imposed on substantial employers by the previous legislation, and is simply carried over, to be superimposed on top of the new legislation until September 26, 1980.

PBGC seems to argue that the Defendant's interpretation is correct.

If, arguendo, the equal protection challenge is not moot, I would reject it as based on an incorrect reading of the statute. Although I admit that the statute is murky and convoluted in the extreme, the only logical way to read it is the way Defendant reads it. No senisble reading could result

in the conclusion which Plaintiffs assert; namely, that substantial employers have entirely escaped their MPPAA liability.

According to principles declared by the Supreme Court, where a statute is unclear, it should be read in the light of its stated purpose and in a manner that does not render it unconstitutional. Certainly, it was part of the statute's purpose and scheme that substantial employers who dropped out during this period would have to pay their share of the actuarially-determined liability. I also adopt such a construction because it permits the statute to be read constitutionally. So I reject the challenge based on equal protection.

The next three subjects I will be discussing — impartial tribunal, denial of access to the courts, and denial of jury trial — are quite closely related and could be grouped together. But I will discuss them separately. However, much of my discussion under the "Impartial Tribunal" heading is equally applicable to the other two challenges.

(C) Impartial Tribunal

I pass now to the matter of impartial tribunal. In this area, Plaintiffs challenge the law because of (1) the way their liability is fixed, (2) who fixes their liability, and (3) the manner in which the fixing is thereafter reviewed.

The statutory scheme is such that the liability is fixed by the Trust alone. Plaintiffs claim that the trustees are not an tribunal here, the trustees of the Carpenters Pension Trust, could be called bipartite. Half are named by the employers and half by the union. They are required by law and by the Trust instrument to give their loyalty to the Trust, and thus they are not to be automatically responsive or responsible to the group or interest which named them.

The employers' trustees are selected by the Contractors Association. Neither Plaintiff before me was a member of

the Association; thus, neither Plaintiff had any voice in selecting the employers' trustees. Also, neither Plaintiff has or had any of its officers or employees among the employers' trustees.

Plaintiffs complain that the task of fixing the liability should not be delegated to the trustees, since both the employers' trustees and the union's trustees have interests which conflict with those of withdrawing employers. Plaintiffs' argument runs as follows: all of the trustees are biased against them in fixing the amount of their liability. The union-nominated trustees are anxious to maximize the assets of the Trust so as to gurantee beyond any risk the payment of future benefits as promised. The employer-nominated trustees are really representing the employers who are still contributing; and those trustees are interested in getting as much money from the withdrawing employers as they can, thereby minimizing the amounts that the employers still contributing will be required to contribute in the future.

In my view, this challenge must be rejected. As stated, all of these trustees are required to serve the interests of the Trust impartially and without reference to who appointed them. They are commanded by the statute to act in a fair manner. General provisions of ERISA impose of them fiduciary duties and impose potential liability if they breach those duties. Also, it is my view that the trustees' function in computing the liability of a withdrawing employer is not judicial or quasi-judicial. The final decision as to the existence and amount of liability belongs to the arbitrator, if the employer is dissatisfied with the trustees' computation. In the arbitration, new evidence and a new record are permitted.

In computing the obligation, the trustees are not free to do as they wish. As a practical matter, and in recognition of their fiduciary obligations, they are apparently required to get professional actuarial advice. The trustees are also not free because there are six pages of detailed instructions in the statute itself. 29 U.S.C. Sec. 1391.

Finally, the trustees' calculation of the unfunded liability will, as a practical matter, govern them in more than one situation. Trustees could not defend a different ad hoc determination for each employer. If they tried to do so, it would very likely be set aside in the arbitration as arbitrary and capricious. Any employer representative who is a trustee would also necessarily recognize that any precedent created might well apply to his own company if it at a later time also withdrew. A final factor to consider is that setting arbitrary or excessively high withdrawal liability may have the effect of discouraging employers from ever beginning participation in trust funds in the future. All of these factors, it seems to me, limit the effect of any bias that any trustee may have against any withdrawing employer.

The cases relied on by the Plaintiffs are totally distinguishable. The municipal mayor who collects his own salary and a large portion of his town's funds out of traffic fines he imposes as judge is obviously biased in performing his judicial function. Ward v. City of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). In Berryhill, the tribunal of optometrists which made the final decision being made by business competitors. Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). And the Brotherhood of Railway and Steamship Clerks case seems to be simply off point. Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963).

Any bias that any trustee might have in computing this liability simply does not rise to the level of constitutional infirmity.

The method prescribed in this statute is a rational way of approach to the problem of setting and fixing the liability. If there is a liability, someone has to fix it. And this method, it seems to me, is within the parameters of what Congress could rationally have decided was a reasonable way of fixing it. I cannot presume that the trustees are so biased as to make the statute unconstitutional on that ground.

Plaintiffs contend that if the tribunal's bias does not itself make the statutory scheme unconstitutional, the effect of the bias is increased to the point of unconstitutional, by the fact that the decision of the Trust has many presumptions in its favor after the decision is made. Plaintiffs point out that the determination by the Trust as to what is owed is made unilaterally, without participation of, or input from, the withdrawing employer.[5] Once the Trust's determination is made, the withdrawing employer may have it reviewed in an arbitration, and, if dissatisfied with the results of the arbitration, may seek a review in court. In the arbitration, the Trust's determination is "presumed correct" and to obtain relief the employer must show, by a preponderance of the evidence, that it was "unreasonable" or "clearly erroneous". 29 U.S.C. Sec. 1401(a)(3). Thereafter, either party may come to the District Court to ask that the arbitration award be enforced, vacated or modified. 29 U.S.C. Sec. 1401(b)(2).

In the court proceeding, there is a presumption of correctness that the arbitrator's findings of fact are correct,

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[5]The withdrawing employer may, after the determination is made, ask the Trust to review the determination, but the Trust is apparently not obligated to grant such review.

which is rebuttable "Only by a clear preponderance of the evidence." 29 U.S.C. Sec. 1401(c). Although the statute is silent on the subject, I must assume that the District Court has the power as it has in the usual cases involving arbitration awards, i.e., it can set aside the award for bad faith, arbitrariness, capriciousness or lack of substantial evidence.

It seems to me that the presumptions created by the statute are reasonable. They are the traditional advantages given to administrative decisions and arbitration proceedings which later come before a court for review. If Congress has the power to set up a statutory scheme of this type, it certainly has the power, rationally exercised, to create these presumptions. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). Whether you or I, as members of Congress, would have done the same thing is irrelevant. The question is whether Congress has acted in accordance with the rationality test. I hold that it has so acted and I reject the "impartial tribunal" challenge.

(D) Denial of Access to the Courts

I pass now to the claim that the statute unconstitutionally denies access to the courts. Much of what I have just said under the heading of impartial tribunal applies equally to this claim. The statute, the course, does not totally deny access to the courts. The courts have the right and jurisdiction not only to judge the constitutionality of the statute, a process in which I am now engaged, but also to review the arbitration, and to have the last word on whether the arbitration which settled the liability will be enforced or set aside.

Essentially, Plaintiffs are arguing that requiring an administrative fixing of liability and then an arbitration, as necessary preconditions to coming to court, is so unreasonably restrictive that the statutory scheme must be stricken down.

The major premise of that argument is one that all lawyers and judges have heard before. It is that arbitration does not protect a litigant's rights as well as court proceedings, because hearsay is allowed, rules of evidence are not observed, discovery is not broad, and so on. These complaints are often voiced about arbitration. But the question here is whether requiring arbitration before coming to court is within Congress' power. I have no difficulty in reaching the conclusion that there is nothing unconstitutional about so preconditioning the right to eventual court review. Andrews v. Louisville & Nashville R. R. Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

This argument is coupled with the argument that the presumptions discussed earlier are a further effective restriction on the access to the courts. Plaintiffs argue that judicial review is just an "empty gesture". As I have said, I find no constitutional invalidity in those presumptions, and I find that the requirement to arbitrate before coming to court, even in combination with the presumptions, is constitutionally valid.

(E) Jury Trial

I move now to the claim that the statute is invalid as infringing a right to jury trial. Again, much of what I have previously said under the last two subject headings applies to this issue as well.

Plaintiffs argue that since the statute results in a money obligation being imposed on them, the Seventh Amendment gives them a right to have that money obligation fixed in a court of law and by a jury. They claim that since the fixing of the obligation is done administratively by the Trust and thereafter in arbitration, they are unconstitutionally denied the right of jury trial.

The mere imposition of a money obligation under a statute does not, in my view, guarantee the right to have the obligation fixed by a court in the first instance or the right to have it fixed by a jury. Just because money is involved, that does not make the procedure for determining the amount of the monetary obligation the equivalent of a common law action for money damages. Several leading cases discuss this principle and indicate clearly that when Congress legislates in the economic field and sets up an administrative scheme for determining a financial liability, there is no right to trial by jury under the Seventh Amendment in the common law sense. Among these cases are Katchen v. Landy, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966); Andrews v. Louisville & Nashville Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); and Wardle v. Central States Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980). I note that Wardle was an ERISA case.

Plaintiffs rely on group of Seventh Amendment cases including Cutris v. Loether, 415 U.S. 189, 94 S.Ct. 1004, 39 L.Ed.2d 260 (1974); Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972); and Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977). This reliance is misplaced. Those were civil rights cases and they hold that when Congress encourages private plaintiffs to sue in civil courts to enforce statutorily created rights (which may include the right to money damages), the parties are entitled to a jury trial. Those cases point out that Congress was silent in the civil rights statutes as to the right to jury trial, and the opinions made the point that there is no particular purpose to be served by denying the right to jury trial.

Our situation is distinguishable. Here, at the same time Congress created the statutory liability, Congress also established a method for fixing the amount due, first admin-

istratively and then by arbitration. Congress has provided that court proceedings occur only at the end of the process and that relief is limited to the usual alternatives available in dealing with arbitration awards — enforcing, setting aside or modifying the award. This statutory scheme must be read as a clear indication that Congress decided against any jury trial right. That decision was, in my view, well within Congressional discretion as part of an economic statutory scheme. The statutory method for establishing the amount of the liability does not violate the Seventh Amendment.

(F) Taking Without a Hearing

I pass now to the last of the issues which I have characterized as less substantial, the claim that the statute is void under due process concepts because it constitutes a taking of Plaintiffs' property without a hearing. The essence of Plaintiffs' argument is that there can be no deprivation of property without a hearing, and that the hearing must be a meaningful one, occurring before the deprivation. Plaintiffs rely on cases such as Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), which involved repossession by a seller, and Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), which involved a garnishment.

As background for this claim, I will review the procedures under MPPAA for assessing the liability, collecting the money, and accelerating the liability. Plaintiffs claim that these procedures are, in toto, the equivalent of a taking.

When the Trust determines the amount due from the withdrawing employer, it is also required to establish an installment payment schedule which the employer may avail itself of. The installments may be payable quarterly or at other intervals established by the Trust. The Trust then is required to notify the employer of the total amount due and

of the installment schedule. The lump sum or the first installment (whichever the employer may elect to pay) is due 60 days after that notice to the employer is served. If the employer fails to pay either the lump sum of the first installment payment within that 60 days, the Trust must then notify the employer that he is in default. If the default is not cured within 60 days after notice of default is served, the Trust "may" revoke the employer's option to pay in installments and require immediate payment of the full amount due plus interest. 29 U.S.C. Sec. 1399(c)(3). Even if the employer is seeking arbitration as to the amount due, he must start paying the installments and continue paying them while the arbitration is pending. After the arbitration decision is made, the employer must continue to make timely installment payments in accordance with that decision, even if he wishes to contest the arbitration award in court. If those payments do not continue during that time, the employer risks being treated as delinquent, and risks losing the right to pay in installments if the arbitration award is later enforced. 29 U.S.C. Sec. 1401(d).

Plaintiffs argue that these statutory provisions put irresistible pressure on them to begin paying their obligation before any hearing. Even if the employer preserves the right to an installment schedule by paying the installments while he is seeking arbitration and during the arbitration process, and thereafter while he is seeking court relief, Plaintiffs describe this option as extremely onerous, since, as the facts of our case show, even the monthly installments can be crippling.

If the employer decides not to pay in installments while contesting the liability in arbitration and in court, he is faced with the loss of the installment option and a declaration that the entire liability is due and payable, plus a liability for interest on the full amount back to the date of the original

assessment. The statute provides for additional liquidated damages of up to 20% of the full amount to be assessed against a delinquent employer, plus an obligation to pay the Trust's attorneys fees in a collection action. 29 U.S.C. Secs. 1399(c)(5), 1451(e), 1451(b), 1145 and 1132(g)(2). The net practical effect of all this, say Plaintiffs, is that they cannot challenge the liability, or even utilize the statutory arbitration process, before starting to make payments.

I reject this constitutional challenge. Although the statute may be onerous to the withdrawing employer who is presented with a difficult alternative, it does not violate the Constitution because there is no seizure of property without a hearing. The constitutional doctrine invoked by Plaintiffs has thus far been extended only to cases of actual seizure. Plaintiff Shelter claims that the doctrine is not limited to instances of actual seizure but cites no authority to support that claim. I decline to extend the rule of Fuentes, supra, and Snidach, supra, as requested by Plaintiffs. I cannot hold that a mere assertion of liability, by itself, constitutes a deprivation of a significant property interest that demands a prior hearing, even if the statute requires that Plaintiffs give up a valuable installment payment option if they determine to pay nothing before the hearing takes place.

I should comment in a little more detail on some of the claims made by both sides under this issue. Plaintiffs claim that if they start to pay the installments during the arbitration proceeding (in order to keep the installment option open to them if they lose) and if later they win the arbitration or a court decides that they owe nothing, there is no provision for their interim payments to be returned. They also say that there is no provision in the statute for payment of either interest or damages for harm to their business that may occur from having to make these "compulsory" installment payments that turn out not to have been owed.

These assertions postulate a chamber of horrors, but do not seem to pose actual problems. Surely a quasi-contractual obligation would exist to return any money paid in error and the obligation to repay would certainly include interest. Whether there would be any consequential damages for harm done to a business from having to pay money improperly demanded might well be governed by local law. The right to such damages cannot be ruled out entirely, but I need not decide that question here.

Defendant argues that we should assume that any arbitration demanded by the employer would be concluded in the 120-day grace period provided by the statute before the employer can be declared in default. Thus, says Defendant, there is no realistic possibility of the whole amount being accelerated before the arbitration ends. I am not persuaded by this argument. As a practical matter, it is hard to conceive an arbitration being conducted with such promptness now or in the near future. PBGC has not yet gotten around to prescribing any rules, regulations or procedures for these arbitrations. The arbitrations, when they do occur, are obviously going to be very complex affairs, depending a great deal on expert testimony as to sophisticated actuarial questions. As a practical matter, it is very doubtful that such an arbitration could be concluded often, if ever, within the 120-day time frame set up by the statute.[6]

To summarize, I sympathize with Plaintiffs when they describe the coercive effect of the entire statutory scheme. They face an onerous burden if they start installment payments before arbitration, and an even more severe burden if they do not start installment payments before a hearing is afforded to them. I do not think, however, that those

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[6]See note 3, supra.

hardships and disadvantages rise to the point of making the statute unconstitutional on the ground that it is an invalid taking of property without a hearing.

(G) Retroactivity

The two final issues, retroactivity and taking without jus compensation, seem to me to overlap analytically to some extent. But counsel for both sides have approached, briefed and argued these two issues separately. The appellate courts also seem to have separated to the two concepts. There is a line of retroactivity cases which delineate what type of retroactivity violates the Constitution and what does not, and there is a separate line of cases involving taking without just compensation. There appears to have been little, if any, cross-citation between these two lines of cases. For all of those reasons, I will treat the two issues separately.

I have determined that MPPAA must be stricken down as applied to employers like those before me, who terminated their collective bargaining agreements and their pension plan membership before the enactment date of the statute, September 26, 1980, but after its application date of April 29, 1980.

In making that holding, I emphasize that Plaintiffs were entitled to terminate their collective bargaining agreements when they did and that those agreements, by their own terms, promised each employer that he had no obligation to make any further payments to the trust fund after he terminated his obligations under the collective bargaining agreement.

I emphasize also that the law as it existed when Plaintiffs withdrew from the plan (ERISA) imposed only a contingent liability, limited to certain circumstances and a certain time frame. I am speaking, of course, of the liability of the withdrawing employer to pay its pro rata share of the un-

funded vested benefits if, and only if, the entire plan terminated or became insolvent within five years after an employer's withdrawal.

Each employer's withdrawal was a closed transaction when the withdrawal took place, with a liability that was clearly defined and limited. By a later legislative enactment, which purported to reach backwards to a date before these transactions were consummated, Congress imposed on each Plaintiff a different, large, unanticipated liability, without any significant moderating or mitigating factors.

That is my conclusion and I will document it in some detail.

In judging retroactive legislation under the Constitution, I must recognize certain general principles that have been enunciated by the Supreme Court. First, if the legislation is in the economic sphere, great deference must be paid to legislative judgments. Second, retroactive legislation is always to be examined with greater scrutiny than legislation which has only a prospective effect.

Counsel for both sides agree that the best test for judging the constitutional validity of retroactive legislation is found in the Seventh Circuit's opinion in Nachman Corp. v. Pension Benefit Guaranty Corporation, 592 F.2d 947 (7th Cir. 1979). I agree with counsel. Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). In its affirmance, however, the Court in a footnote cited with apparent approval part of the analysis used by the lower court. [n. 12, 446 US. at 367, 100 S.Ct. at 1729.] The Seventh Circuit's opinion listed four factors as relevant to retroactive analysis and I adopt those factors here.

The four factors listed in Nachman are:

(1) "The reliance interests of the parties affected";

(2) Whether the private interest which is impaired is "in an area previously subjected to regulatory control";

(3) "The equities of imposing the legislative burdens"; and

(4) The inclusion of "statutory provisions designed to limit and moderate the impact of the burden."

Nachman also emphasizes that the validity of the legislation does not rest on the way a court balances these factors one against the other. The factors are used as guidelines or measuring devices for the final and ultimate judicial determination, which is "whether the legislation imposes a rational means for a legitimate end."

I will now consider these factors individually and discuss how MPPAA measures up under them.

(a) The first factor is reliance. In this connection, I think it is appropriate to examine the extent to which the parties relied on existing law continuing, and to examine the types of interest involved in their reliance. I want to start with examining the reliance of the employers, the Plaintiffs here.

Defendants argue first of all that employers, including these Plaintiffs, could not have relied on existing law continuing because they knew or should have known that (1) the coming legislation was going to impose a substantial new burden on withdrawing employers, and (2) that the new legislation would have a drastic retroactive effect. I reject that argument. No one should be held reasonably to anticipate a given type of Congressional action on any subject. Outside of the tax area, there is no authority that imposes on anyone the burden of predicting Congressional action.

It is an undisputed fact that these Plaintiffs had no knowledge of the forthcoming legislation. The mere fact that one or more trade journals speculated about Congressional interest in the field does not in any view outweigh that un-

controverted evidence.

The cases also tell us that in measuring reliance of a party, one must look at what that party would have done if he had known that the legislation was coming. See Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977). The Nachman opinion follows this rule.

Here, the Plaintiffs offered convincing evidence that they would have changed their conduct and would have taken one of several alternative actions to avoid this catastrophic liability from being imposed, had they known MPPAA was coming. One option was to renew their collective bargaining agreements and continue making the usual contributions to the Trust fund. They also could have gone completely out of business. Or, they could have sold their assets to a comppany which remained in business and was a participant in the pension plan. Any of those course of action would have allowed the Plaintiffs to avoid the liability. All would have been open to Plaintiffs if they had had notice of the statute's potential application to them.

I should note that in Nachman the court likewise found a high degree of reliance by the employer, but held it to be counterbalanced by other factors. Nachman upheld ERISA, a much more moderate retroactive statute.

There is one other important factor. In Nachman the law that was being discussed was already enacted and in effect when the plaintiff closed up his business. He knew or should have known what the law was when he took the action in question. He knew what he was subjecting himself to when he terminated his plan. Our Plaintiffs, had they withdrawn on September 27, the day after enactment of MPPAA, would be in the same position. They would have been subject to

an existing statute which had a retroactive effect. But our Plaintiffs withdrew long before the enactment date and were caught by a later-enacted statute which purported to be retroactive in applicaiton. The distinction I am making is between statutes which are retroactive in effect, though prospective in application, and statutes which are retroactive in application. The latter present greater hardship to those persons affected and more serious due process problems.

Generally, the concept of reliance in a retroactivity case has focused on the state of mind and the degree of fairness as viewed from the perspective of the party who bears the new or added burden from the legislation, and that party is the employer in our situation. But the Nachman opinion requires us to consider not only reliance from the employer's point of view but also reliance by the other affected party, the employees. Therefore, I should and will look at reliance from the employees' standpoint as well.

From that point of view, it seems to me that Nachman is distinguishable from our cases. Nachman involved a one-employer pension plan. When that employer went out of business, the employees who had been relying on pension benefits for their future had their expectations disappointed. In Nachman, only 35 per cent of the vested benefits were funded when the employer went out of business. Non-vested employees would apparently have wound up with nothing, and vested employees would have had their benefits drastically reduced from the expected level. These employees were looking solely to this one employer for future benefits.

In the present cases, it cannot be claimed that the workers of either Plaintiff were relying on their employer's continuing in the multi-employer pension plan, nor were they relying on that particular employer to pay the pension benefits. The promises that were made to Plaintiffs' employees, and upon which they may have relied, were made in our

cases by the Trust or by the union, and not by their particular employer.

Further, when our Plaintiffs terminated their participation in the Trust fund, that did not end the Trust fund nor did it render the fund insolvent. There is no clear or immediate harm shown to have resulted to the employees' reliance interest as a result of our Plaintiffs' withdrawal. The evidence in our cases is that after the withdrawal of both Plaintiffs, the Defendant Trust remains in sound financial shape. Thus, the reliance interest of the employees in our cases is far more nebulous and far less affected than it was in Nachman. Indeed, it may not be affected at all.

(b) I turn now to the second element, whether the interests impaired by the retroactive features of the legislation are in an area previously subject to regulation. That element, although enunciated in Nachman, was little discussed there. There is only a footnote, which merely discusses some prior IRS regulation of the pension field which had occurred before the passage of ERISA. In my view, this elements is the least important of the four, and the Nachman court itself did not treat it very significantly.

As I consider this element, I feel that it is really just another facet of reliance. It goes to the reasonable expectations of the party upon whom the burden of the retroactive legislation falls.

It may be instructive, in analyzing the force and effect of this element, to discuss a couple of the leading cases. In Federal Housing Administration v. The Darlington, Inc. 358 U.S. 84, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958), the plaintiff was in the business of building and renting apartments, and he built them with federal aid in the form of FHA-insured loans. Among the regulations in existence when he took out the loan for this particular project was a requirement that

the project be for residential housing. Any type of residential tenant could apparently qualify. After the project was built, the regulations were changed so that the owner was prohibited from renting the units to transients.

First of all, it seems to me that that change could easily be viewed as a mere clarification or modification of the initial restriction. The Court viewed it as such and said that such a change was the anticipated and normal risk taken by those who do business in a regulated field. The Court then upheld the change.

The other case worth discussing is Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061 (1940). In Veix, an investor bought some shares in a savings and loan association. When he bought them, there was a right to a later turnback or redemption of those shares. There were statutes then in effect governing the conditions of redemption. After the plaintiff bought his shares, amendments to the law were passed which served further to restrict the conditions under which redemption could take place, including a mere restrictive definition of the funds out of which such redemption could be paid.

The case was brought under the Contracts Clause of the Constitution because state law was involved. However, the Supreme Court's approach is significant because the Court said that when the plaintiff purchased into an enterprise already regulated, "in the particular to which he now objects", he took the risk of further legislation of the "same topic."

I interpret this to mean that for retroactive legislation in a previously regulated area to be valid, a new and more burdensome legislation must be closely akin in type and scope to the prior regulation.

It should be noted also that in neither Darlington nor Veix was the legislation retroactive in application. The legislation

in each case applied to events that occurrred after its enactment date.

It should further be noted that in each case the matter involved was a statutorily-created privilege. In Darlington, it was a government-back loan. In Viex, it was a statutorily-created right of redemption, a right not generally afforded shareholders in an ordinary corporation.

In reviewing the significance of prior regulation, I believe this element tends to favor the Plaintiffs here. It is evident that there was some prior regulation of multi-employer funds and of contributing employers prior to the passage of MPPAA. But MPPAA imposed much heavier and more drastic burdens than had been imposed by prior law. Our Plaintiffs, although they were in a field that the government had already regulated somewhat, could not reasonably have foreseen a change of this scope and nature in the regulation of the field, especially when applied on a totally retroactive basis.

The essence of the concept of reliance, as I veiw it, is that a party should be able confidently to anticipate the consequences of a transaction, knowing what the law provides when he concludes that transaction of the scope of regulation, but cannot foresee change of a most drastic type, especially when applied to a transaction already completed before the new legislation is enacted. The sole exception to these principles may well be in the field of taxation, which I regard as sui generis because of the taxable-year concept.

(c) I turn now to the third element, the equities of imposing the burdens of retroactive regulation on the parties that must bear the burdens.

The Nachman opinion points out that we look at equities for the essential purpose of determining whether the retroactive law is rational or irrational. The Nachman court

regarded serveral cases as leading authorities on this point, including Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed. 2d 727 (178), and Railroad Retirement Board v. Alton R. R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935).

In Spannaus, a Minnesota statute, which was passed before the plaintiff employer closed his Minnesota plant forced any employer who closed a Minnesota business to make pension payments to his overall pension plan, such employees had no vested rights. The law was struck down partly on the ground, as the Nachman opinion says, that the employer was being forced to pay added compensation for fully compensated services.

In Alton, Congress passed a railroad pension law which required pension benefits to be paid not only to workers then working for the railroad, but also to some who had ceased working for the railroad long before the statute was passed. It was struck down on the same ground as the Minnesota statute, since it forced payment of added compensation for services already fully compensated. There are two other relevant cases, which should be compared with Spannaus and Alton. They are Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), and Todd Shipyards Corporation v. Witthuhn, 596 F.2d 899 (9th Cir. 1979).

In Usery, Congress had passed a statute requiring employers to compensate mining employees who contracted black lung disease from their mining activities. The law applies even if the miners had terminated their relationship with the employer long before the law was passed, if the disease was caused by the employment. The law was held valid.

In Todd Shipyards, the Longshoremen and Harbor Workers Compensation Act was amended to provide death ben-

efits for workers injured on the job who later died of such injuries. The amendment was prospective, as it applied to all workers who died after its effective date as a result of on-the-job injuries. In that particular case, it was applied to a worker who had been injured before the effective date of the statute but who died after the effective date. The statute was upheld. It is worth nothing that the court determined that this act was prospective both in effect and application.

Assume, arguendo, that both Todd and Usery are true retroactivity cases, as they make the employer liable for consequences of acts which occurrred before the legislation was enacted. In my view, both cases can still be distinguished from our cases, in that in both Todd and Usery the employer controlled the conditions which caused the harm to the workers. The retroactive legislation called on the employer to compensate the workers for actual harm caused by the now-burdened employer. But in our cases, it cannot be said that these Plaintiffs, these employers, caused any harm or failure of expectation. These Plaintiffs fulfilled their obligations under the collective bargaining agreement to the letter, and cannot be blamed in any sense for the debts or the failed promises of the Trust fund.

The same distinction I have just made can also be made between our cases and Nachman. Nachman involved a single employer pension plan. The employer himself, along and directly, caused the harm and the failure of expectations when he closed his business. That cannot be said of our Plaintiffs.

To summarize the discussion under this third factor, I think our cases are much closer in fact and rationale to the Supreme Court holdings in Spannaus and Alton than to the holdings in Usery and Todd Shipyards. Moreover, it should not be forgotten that in all of this we are dealing with equities. This factor, as defined by the Nachman court,

emphasizes the equities of imposing or not imposing certain burdens. Our cases have substantial equity factors in favor of the employer and against imposing such drastic and clearly retroactive burden upon the employer.

It is undeniably true that the harshest burden of MPPAA is placed on the withdrawing employers who withdraw between April 29 and September 20. Employers who withdrew earlier have no burden except the minor contingent liability of the old ERISA statute. Those who stayed in after September 26, 1980 have many options available to them which our Plaintiffs do not have. For example, as discussed earlier, those employers who stayed in the fund can sell their assets to a buyer who will continue the business and continue participating in the fund. If the employees stay in business, they can choose to remain affiliated with the Trust and pay their regular contributions, with no catastrophic lump-sum obligation such as that imposed on the Plaintiffs in our cases. So our Plaintiffs, and those similarly situated, are being forced to bear a very disproportionate burden. They must bear the costs of a large problem which, so far as I can see, they had little if any role in creating.

(d) I turn now to the fourth factor. This final factor delineated in Nachman is whether the statute includes "provisions designed to limit and moderate the impact of the burdens," and its importance is highlighted by the extensive treatment given to it in the Supreme Court's Nachman opinion. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 367 n.12; 100 S.Ct. 1723, 1729, n.12, 64 L.Ed.2d 354 (1980).

To put this another way, the Court should examine whether the burdens imposed by the retroactive legislation are overly drastic or whether they are substantially modified, mitigated, or lessened by other provisions of the statute. On this test, and under this factor, the Plaintiffs in my view

have by far the best of it.

Contrast MPPAA, and how harshly it deals with these Plaintiffs, with the statutes dealt with in Nachman, Usery and Spannaus. In Nachman, which upheld ERISA in its pre-MPPAA form, the Court leaned very heavily on the various protective limits of the statute. For eample, the Court mentioned that ERISA, as it then was, limited possible obligations to 30 per cent of the employer's net worth. Similarly, withdrawing employers became liable only for the amount which was guaranteed by PBGC, which was less than the total amount of vested benefits. Moreover, there was a phase-in period of 12 months, a kind of grace and transition period, during which the impact of the statute, initially mild, gradually increased. Contrast that grace period with the 5-month retroactive period of MPPAA. The Court also noted that under ERISA, employers had an opportunity to obtain low-cost insurance from PBGC to cover the contingent future liability. Finally, there was statutory authority for PBGC to waive the whole liability or to moderate or defer it. None of these limiting or moderating factors are present here. MPPAA is far more drastic in effect than the statute addressed Nachman, with far fewer mitigant factors.

In Usery, it should be remembered that one major mitigating factor was that the government paid a substantial portion of the liability for black lung disease.

In Spannaus, where the law was stricken down, it was very important to the Court that there was no grace period and that the law was immediately effective. MPPAA not only has an immediate effect, but even has a retroactive effect, covering transactions already completed.

Defendants have argued, not convincingly, that MPPAA has moderating provisions. They point out that under 29 U.S.C. Sec. 1383(b)(2), withdrawing employers may avoid

the liability of MPPAA by going out of the construction business immediately and remaining out of it for five years. In the context of this case, that cannot be considered a moderating provision because that option was not available to the Plaintiffs. They had no idea that the law would be passed and could thus have made no intelligent decision to go out of the construction business upon withdrawal from the plan, being unaware of both the liability they incurred by staying in business and the option of avoiding it by leaving the business.

The Defendant has also argued how easy it is for Plaintiffs to pay in monthly installments. But that does not impress me either, especially in the context of a case where the monthly payments would take 94 per cent of G & R's annual income. The severity in our cases is in the total amount of the liability, and it is not much mitigated by the right to pay monthly with accumulating interest.

The Defendant also claims that the Plaintiffs could now rejoin the plan, and that this should be viewed as a moderating factor. But an employer cannot unilaterally rejoin the plan, because he must be a party to a collective bargaining agreement to participate in the plan. Moreover, it seems to me that it is not absolutely clear that the imposed liability would be abated by rejoining. At this point there are no regulations to tell us when, under what conditions, and to what degree the liability would be abated if an employer who has withdrawn does rejoin the plan. I would not call the ability to undo the transaction a mitigating factor. Moreover, that ability does not exist realistically, as I see the facts.

To summarize, in evaluating the four factors of Nachman, giving to each the appropriate weight in the light of the facts of our cases and the statute in question, I have come to the conclusion that this retroactive law is invalid as ap-

plied to these two Plaintiffs who withdrew before this enactment date.

The Defendant continually argues in our cases that it was absolutely necessary for Congress to apply this statute retroactively. They say that if Congress had not done so, there would have been a large group of people who withdrew before the enactment date, thus endangering the pension plans even further. But there was almost no probative evidence on this point and I do not find this argument very convincing as a practical matter. No employer was free to withdraw just because he wanted to. Every employer was bound by a collective bargaining agreement and bound by various kinds of notice provisions that had to precede any withdrawal.

(H) Taking Without Just Compensation

My holding on retroactivity makes it unnecessary for me to deal with the claim that the MPPAA is unconstitutional on the separate challenge of taking without just compensation. I do not believe in unnecessary dicta, and I will make no ruling on that challenge. However, I must say that there are some serious questions raised against the statute on this ground.

(I) Conclusion

My ruling is that the MPPAA is unconstitutional as applied to these two Plaintiffs, and all others similarly situated, who withdraw before the enactment of the statute.[7] As to

[7]In Peick v. Pension Benefit Guaranty Corporation, 539 F.Supp. 1025 (N.D. Ill. 1982), the court held the statute valid on its face. The court said: "This is an extremely close call. Congress has probably gone to the very limits of its constitutional power." 539 F.Supp. at 1056. The Illinois court also took note of this court's "tentative view" that the statute was unconstitutional, and stated that because of the facts developed in the Shelter case, such a view was "not necessarily inconsistent with [the] holding that MPPAA survives facial attack." 539 F. Supp. at 1056 n. 79.

employers who withdrew after the statute was enacted, I believe that although there may be some problems with the statute on the issue of retroactive effect, I make no holding with respect to those employers.[8]

I want to make it very clear that I am expressing no opinion on the statute's validity on either retroactivity or taking grounds as applied to employers who remained in pension plans on or after MPPAA's enactment date. No such case is before me, and any such case should be decided on its own facts.

Having granted judgment for Plaintiffs, a corollary judgment must go against Defendant on its counterclaims which seek to collect the assessed liability from each Plaintiff. This opinion will constitute the Court's findings of fact and conclusions of law.

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[8] Two courts have held that the statute is valid when applied prospectively. See Peick v. Pension Benefit Guaranty Corporation, supra, n.7; and S & M Paving, Inc. v. The Construction Laborers Pension Trust of Southern California, 539 F.Supp. 867, 81-5929-TJH (C.D. Cal. April 12, 1982).

APPENDIX D.

29 U.S.C. (SUPP. V 1981).

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in an amount determined under this part to be the withdrawal liability.

§ 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

§1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there

has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before April 29, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before April 19, 1980, or for which here was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

§ 1399. Notice, collection, etc. of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsore shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used

for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the require employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of why withdrawal described in subparagraph (D.)

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan—

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subpargraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal

pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of—

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the

total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules—

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

§ 1401. Resolution of disputes.

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator' fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination

shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of this evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1451. Civil actions

(a) Persons entitled to maintain actions.

(1) A plan fiduciary, employer, plan paticipant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiem-

ployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time.

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts.

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process.

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses.

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations.

An action under this section may not be brought after the later of —

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation.

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

§1461. Effective date; special rules.

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan —

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with

the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability which might be imposed under subtitle D of this subchapter if the plan terminated on or after September 2, 1974. The provisions of subtitle D of this subchapter do not apply in the case of such a plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

(c)(1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before August 1, 1980. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Respresentatives, and the Committee on Labor and Human Resources and the Committee on Finance of the Senate.

(2) The corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if —

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after July 31, 1980.

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this chapter made by the Multiemployer Pension Plan Amendments Acts of 1980 shall take effect on September 26, 1980.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability, takes effect on April 29, 1980.